Supreme Court, U.S.
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No. 05-

In the Supreme Court of the United States

CITY OF KNOXVILLE,

Petitioner,

v.

ENTERTAINMENT RESOURCES, LLC,
d/b/a Fantasy Video,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Tennessee

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Petition involves a challenge by an adult book store to City of Knoxville Code section 16-468, which governs the location of sexually oriented businesses, including those that meet the definition of "adult bookstore." Under the ordinance, an "adult bookstore" is an establishment "having as a substantial or significant portion of its stock and trade books, magazines and other periodicals, videotapes or other electronic media which are distinguished or characterized by their emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas . . . ."

The Question Presented is:

Did the Supreme Court of Tennessee err as a matter of law in holding the phrase "substantial or significant portion of its stock and trade" within the City's definition of "adult bookstore" is unconstitutionally vague?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding below are completely set forth in the caption.

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PETITION FOR A WRIT OF CERTIORARI

The City of Knoxville respectfully petitions for a writ of certiorari to review the judgment of the Tennessee Supreme Court in this case.

OPINIONS BELOW

The Tennessee Supreme Court's opinion is published at 166 S.W.3d 650. Pet. App. 1a-29a. The opinions and orders of the Tennessee Court of Appeals, Pet. App. 30a-48a, and the Knox County Chancery Court, Pet. App. 49a-107a, are unpublished.

STATEMENT OF JURISDICTION

The Supreme Court of Tennessee entered its opinion on June 29, 2005. This court has jurisdiction to review on a writ of certiorari the decision in question pursuant to 28 U.S.C. § 1257.

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

Section one of the Fourteenth Amendment to the Constitution of the United States provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

> law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend XIV, § 1.

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

Subsection (a) of Knoxville City Code section 16-468 provides:

> *Adult bookstore* means an establishment having as a substantial or significant portion of its stock and trade books, magazines and other periodicals, videotapes or other electronic media which are designated or characterized by their emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas, or an establishment with a segment or a section devoted to the sale or display of such material.

Knoxville City Code § 16-468(a).

Subsection (b) of Knoxville City Code section 16-468 provides:

> It shall be unlawful to establish, operate or maintain any adult business, that is, adult bookstore, adult motion picture theatre, adult mini motion picture theatre or adult cabaret, within the city, if the proposed location is within one thousand (1,000) feet of:
> (1) A residentially zoned district;
> (2) Any area of amusement which caters to family entertainment;
> (3) Any area which is devoted in part or exclusively to recreational activity;
> (4) Any school, park, church, mortuary or hospital;
> (5) Any adult business as defined by this section; or
> (6) Any other regulated use, including but not limited to establishments authorized to sell any alcoholic beverages for on- or off-premises consumption. Any location selling beverages that contain less than five (5) percent alcohol are not to be considered with regard to the required spacing.

Knoxville City Code § 16-468(b).

STATEMENT OF THE CASE

This case presents the important question of whether a municipal ordinance that regulates the location of sexually oriented businesses must set forth a specific percentage of an establishment's stock and trade that is sexually oriented in order for the establishment to be classified as an adult bookstore. The Tennessee Supreme Court held that the City's ordinance is unconstitutionally vague because the court concluded that the phrase "substantial or significant portion" is not susceptible to a narrowing interpretation and fails to provide adequate guidance to sexually oriented businesses and law enforcement. Although the decision submitted for review

applies only in the State of Tennessee, municipal ordinances throughout the country define "adult bookstore" with identical or nearly identical language. Consequently, Supreme Court review of this decision would provide guidance to courts and municipalities nationwide.

The federal question presented in this petition was raised in the pleadings in the trial court, in the respondent's appeal to the Tennessee Court of Appeals, and in the City's appeal to the Tennessee Supreme Court. While the trial court issued an injunction based upon the City's ordinance and rejected respondent's vagueness argument, the state appellate courts concluded the ordinance was invalid due to vagueness under the constitutions of the United States and of the State of Tennessee. In doing so, the Tennessee Supreme Court recognized that "Article I, section 8 of the Tennessee Constitution provides an identical protection" as that provided by the Due Process Clause of the Fourteenth Amendment. Pet. App. 8a. Accordingly, review of the Tennessee Supreme Court's decision as based upon the United States Constitution is jurisdictionally permissible under *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). As explained below, the Court should grant this petition and resolve the conflict between the Tennessee Supreme Court's decision and the decisions of other federal and state appellate courts.

* * * *

In 1979 the Knoxville City Council adopted an ordinance prohibiting adult businesses from locating within 1,000 feet of certain land uses, including residentially-zoned districts, areas devoted to recreational activity, and establishments selling alcoholic beverages. Pet. App. 3a. By its terms, the ordinance applied to "an establishment having as a substantial or significant portion of its stock and trade" various forms of

media that are distinguished or characterized by their emphasis on specified sexual activities or specified anatomical areas. Pet. App. 2a. On August 3, 1998, Entertainment Resources opened an adult bookstore called Fantasy Video (hereafter, "Fantasy") at 6422 Papermill Road in Knoxville. At this location, the store was within 1,000 feet of both a restaurant that sold alcoholic beverages and a residentially zoned district. Upon opening the adult bookstore's inventory consisted of 80% sexually explicit videos and 20% general release videos. Pet. App. 3a. Fantasy chose to open the store at this location based on its counsel's advice the City's ordinance was unconstitutional. Pet. App. 4a.

After the adult bookstore opened, Knoxville police officers began to inspect the store and issue citations for violation of the ordinance. Pet. App. 4a. During the second half of 1998, the store manipulated its inventory so that sexually explicit videos decreased gradually from 80% to, eventually, 30% of its inventory. Pet. App. 5a. At least 75% of the store's revenues, however, came from the sale or rental of sexually explicit videos. Pet. App. 5a-6a, 99a. Fantasy sought a specific percentage from the City in order to evade the "substantial or significant" determination, but the City refused to provide a specific percentage. Pet. App. 4a, 43a.

On November 4, 1998, the City filed suit to enjoin Fantasy from operating an adult bookstore at the Papermill Drive location. Fantasy counterclaimed the ordinance was impermissibly vague under the constitutions of the United States and of the State of Tennessee. Pet. App. 6a.

On December 10, 1998, the Chancery Court issued a temporary injunction restraining Fantasy from operating an adult bookstore at the Papermill Road location. Pet. App. 6a. Notwithstanding Fantasy's manipulation of its inventory to

bring its sexually explicit materials to 30% of total inventory items, the trial court found that "[t]he majority of the floor space at Fantasy Video is occupied by the adult section containing these adult videos. Over 75 percent of the store's revenue and at least 85 percent of its customers are attributable to those videotapes." Pet. App. 99a. The trial court also noted that the "considerably smaller" front area of the store contained cardboard boxes with general release videos — "[a]ll of [which] were purchased from used video brokers" and included "the type of video that is provided to the public by the Church of Latter Day Saints." Pet. App. 100a. In light of these facts, the court found Fantasy's claim that it attempted to come into compliance with the ordinance to be "not the least bit credible." Pet. App. 103a. The trial court went on to explain the factors relevant to application of the adult bookstore definition:

> Counsel for defendant is correct that the ordinance does not address percentage of sales, content of non-adult tapes, percentage of floor space, and so forth; however, the Court finds that all of this information and all of these factors are to be considered in determining whether there is a substantial or significant portion of the stock in trade comprised of these defined adult videos. It is incredible that defendant would assert that there is not a significant and substantial portion of the stock made up of these types of videotapes. In fact, the Court finds that the general family inventory, despite its number, is, in fact, insignificant and insubstantial to this business's stock in trade. These videos, *of which defendant does not even have an inventory*, were brought in, the Court finds, for the sole purpose to try and create, in essence, *a sham that defendant has tried to pass off as other than a business whose primary*

> *purpose is adult entertainment, with it stock in trade made up principally of videotapes characterized by their emphasis on sexual activities and anatomical areas.*

Pet. App. 100a-101a (emphasis supplied).

After the temporary injunction was entered, "[i]nstead of attempting to comply with the temporary injunction, [Fantasy] instead elected to discontinue renting any of the so-called adult videos held for rental in the 'back room'. The only videos thereafter offered for rental were those un-catalogued general purpose videos" which the court found were accumulated not to sell, but "in an effort to avoid the zoning ordinance." Pet. App. 50a. As expected, the trial court observed, "no 'front room' videos were rented and the store ultimately closed." Pet. App. 50a. Fantasy later lost its lease at the Papermill Drive location, and the City moved to dismiss the case as moot. The trial court agreed that the case was moot, except for Fantasy's claimed damages for wrongful injunction.

Ultimately, on April 15, 2002, the trial court rejected Fantasy's claim of wrongful injunction and its corresponding vagueness challenge, noting the store was "in direct violation" of the ordinance and that Fantasy "knew this when it acquired the premises at 6422 Papermill Road, Knoxville, Tennessee and immediately filed suit in the U.S. District Court for the Eastern District of Tennessee to challenge the constitutionality of the ordinance." Pet. App. 51a. The trial court also concluded that the ordinance was a content-neutral regulation designed to serve the City's substantial government interest in preventing the negative secondary effects of sexually oriented businesses. Pet. App. 51a, 102a (finding negative impacts relating to Fantasy Video, ranging from

"theft of personal property, to complaints from customers, to decrease in family business, to decrease in female patrons, to litter, even the reporting of finding condoms in the parking lot," as well as "other problems that have developed in the months since Fantasy Video opened in August, and which were not present" previously). The court thus concluded that the ordinance, and the temporary injunction, were constitutionally sound and dismissed the action. Pet. App. 51a.

The Tennessee Court of Appeals reversed the chancery court, holding that the phrase "substantial or significant portion of its stock and trade" is unconstitutionally vague and unenforceable due to imprecision that would prevent men of common intelligence from understanding the ordinance. Pet. App. 44a. The court relied heavily on testimony of police officers who were unable to define the parameters of "substantial or significant portion." Pet. App. 41a-44a.

The Tennessee Supreme Court affirmed the Court of Appeals. Pet. App. 8a. Because it concluded the ordinance affects communication protected by the First Amendment, the Supreme Court considered a facial challenge to the ordinance without considering whether the law was vague as applied to Entertainment Resources. Pet. App. 10a. The court held the ordinance violated due process because the terms "substantial or significant portion" did not provide a sufficiently clear standard of conduct and because the court concluded it could not impose a narrowing construction to the ordinance to salvage its constitutionality. Pet. App. 11a-14a. This petition followed.

REASONS FOR GRANTING THE PETITION

The grounds for granting certiorari to review the Tennessee Supreme Court's judgment in this case are straightforward.

I. The Decision of the Tennessee Supreme Court on an Important Federal Question Conflicts with the Decisions of United States Courts of Appeals and of Several State Appellate Courts.

There is a significant split of authority on whether the phrase "substantial or significant portion" is unconstitutionally vague in the context of defining an adult business. The split involves two federal courts of appeals, several state appellate courts, and the Supreme Court of Tennessee. Importantly, the decision of the Tennessee Supreme Court conflicts with the law of the Sixth Circuit, the federal circuit in which Tennessee sits. Under the present state of the law, the result of a case challenging a similar adult business ordinance in Tennessee will turn on whether the suit is litigated in state or federal court. Due to this split of authority and the important nature of the issue to municipalities nationwide, the Court should grant certiorari and resolve this recurring First Amendment question.

First, the Tennessee Supreme Court's decision conflicts with the Eighth Circuit's decision in *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413, 1419 (8th Cir. 1994). In *ILQ*, an adult bookstore challenged the "substantial or significant" phraseology as unconstitutionally vague, claiming that Rochester ordinance violated due process in part because the city's "zoning officials refuse to clarify what amount of sexually explicit material will violate" the ordinance. *Id.* at 1419. In *ILQ*, as in this case, the adult bookstore was "not

primarily concerned with the risk of criminal prosecution," or it "would have located [its adult bookstore] in an unrestricted part of the City" rather than "confronting the City with an up-and-running adult bookstore" in an impermissible location. *Id.* The Eighth Circuit rejected the adult bookstore's vagueness challenge, noting that the phrase "substantial portion" appears "frequently in the United States Code." *Id.*

The Sixth Circuit also rejected a vagueness challenge to similar language in *511 Detroit Street, Inc. v. Kelley*, 807 F.2d 1293, 1296 (6th Cir. 1986). In *Kelley*, a bookstore owner was convicted under the state obscenity statute. The statute provided that a first degree violation is committed if, among other things, dissemination of the obscene materials is "a principal part or a substantial part of the stock in trade" of the business. The Sixth Circuit held that the words of that provision, including the word "substantial" in particular, were not unconstitutionally vague because they "are found throughout the law and are within the understanding of ordinary people." *See also 15192 Thirteen Mile Rd., Inc. v. City of Warren*, 626 F. Supp. 803, 819 (E.D. Mich. 1985) (same).

By contrast, the Tennessee Supreme Court in this case held the phrase "substantial or significant portion" provided no notice to ordinary people and amounted to a standardless provision that could not be defined with any degree of precision. 166 S.W.3d at 657. This direct conflict with the federal court of appeals that presides over Tennessee clearly calls for the review of the Tennessee Supreme Court's decision.

Additionally, the opinion below conflicts with the decisions of several state appellate courts, each of which has rejected the claim that the use of the phrase "substantial or

significant" to define "adult bookstore" creates an unconstitutional ambiguity. The phrase, taken directly from the ordinance upheld in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 54 n.5 (1976), has been accepted, over vagueness challenges, by multiple state appellate courts. For example, in *City of Chicago v. Scandia Books, Inc.*, 102 Ill. App. 3d 292, 430 N.E.2d 14, 18, 58 Ill. Dec. 72 (Ill. Ct. App. 1981), the Illinois Court of Appeals concluded that "[t]he word 'substantial' as used in the definition of adult bookstores is not so indefinite as to render the Ordinance void and unenforceable. That term has been construed as having an ascertainable meaning in numerous statutory schemes." 430 N.E.2d at 18 (citations omitted). Similarly, in *Golden Triangle News, Inc. v. Corbett*, 689 A.2d 974, 984-985 (Pa. Commw. Ct. 1997), *aff'd* 717 A.2d 1023 (Pa. 1998), the court held that "[t]he terms 'substantial' and 'significant' have recognized meanings in the English language and the use of such in the definition of 'adult bookstore' does not render it vague merely because a percentage of business in one type of item is not specified." The Indiana Court of Appeals is in accord. *Dandy Co., Inc. v. City of South Bend*, 401 N.E.2d 1380, 1386 (Ind. Ct. App. 1980).

Recently, the Colorado Court of Appeals weighed in, explaining that "significant" means "deserving to be considered; important; notable," and that its antonyms "include meaningless, trivial, trifling, paltry, and picayune." *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 93 P.3d 633, 639 (Colo. Ct. App. 2004). These definitions are wholly consistent with the trial court's determination in this case that "significant" means "noteworthy; important," and that "substantial" has been defined to mean "of real importance or validity," "of large size or account," and "commercially successful." Pet. App. 56a. Yet the appellate court in *Z.J. Gifts* concluded, contrary to the Tennessee Supreme Court,

that "the terms 'significant' or 'substantial' are not unconstitutionally vague and that the ordinance provides a person of ordinary intelligence a reasonable opportunity to understand its meaning and application." *Id.* at 639.

The foregoing makes it clear that the Tennessee Supreme Court's decision is the most recent of numerous decisions addressing the prevailing definition of "adult bookstore" in municipal codes across the country. These decisions span more than two decades of cases involving cities both large and small. Review of the decision below for the purpose of clarifying this question of law is appropriate in light of the conflicting answers provided by the courts that have addressed the issue. *See also 105 Floyd Rd., Inc. v. Crisp County*, 613 S.E.2d 632 (Ga. 2005) (invalidating use of "substantial business purpose" to define "sexually-oriented adult use"). Because the Tennessee Supreme Court incorrectly held the phrase "substantial or significant portion," in the context of defining an "adult bookstore," to be unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment, this Court should grant certiorari and reverse the decision. In so doing, the Court would vindicate municipalities that have drafted regulations modeled after this Court's decision in *Young* and provide substantial guidance to both local governments and the lower courts reviewing their ordinances.

II. The Tennessee Supreme Court Erred As a Matter of Law.

"An enactment is void for vagueness if its *prohibitions* are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (emphasis supplied). A statute is not unconstitutionally vague if "ordinary people, exercising ordinary common sense, can understand it and avoid conduct which is prohibited." *United States v. Salisbury*, 983 F.2d

1369, 1378 (6th Cir. 1993). To meet this standard, enactments need not provide "meticulous specifics" or mathematical precision; they are permitted "flexibility and reasonable breadth." *Grayned*, 408 U.S. at 110. A reviewing court should "bear in mind that unavoidable imprecision is not fatal and celestial precision is not necessary." *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821, 834 (4th Cir. 1979). Uncertainty at a statute's margins will not warrant facial invalidation if it is clear what the statute proscribes "in the vast majority of its intended applications." *Hill v. Colorado*, 530 U.S. 703, 705 (2000). When evaluating a facial challenge to an ordinance, courts must consider any limiting construction that may be applied to the challenged language. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982).

The Tennessee Supreme Court committed two principal errors in striking the language "substantial or significant portion of stock and trade" as unconstitutionally vague on its face.

First, that court erred in concluding that "the ordinance is vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.'" Pet. App. 15a (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971)).

On the contrary, as the court recognized, other businesses in the City that carry some sexually explicit videos were able to conduct their businesses without violating the ordinance. Pet. App. 15a. Moreover, the *prohibition* in the ordinance forbids not the operation of an adult bookstore, but rather the operation of an adult bookstore within 1,000 feet of certain sensitive land uses. This clear prohibition makes less likely

that the "fair notice" requirement of the Due Process Clause will be offended. *See Gammoh v. City of La Habra*, 395 F.3d 1114, 1120 (9th Cir. 2005) (rejecting vagueness challenge to, *inter alia*, use of "substantial" in definition of "adult cabaret dancer" and explaining that "[i]t is not illegal to be an adult cabaret dancer; only to be an adult cabaret dancer performing within two feet of a patron. This distinction introduces additional objectivity into the Ordinance because the act that is prohibited - being within two feet of a patron - is certainly not vague"). Here, is undisputed that Fantasy could have conducted its business, with 100% of inventory in sexually explicit material, as a matter of right in hundreds of permissible locations spread across different areas of the City, provided that it remained at least 1,000 feet from certain land uses. Pet. App. 65a (noting that over 300 are sites available for adult businesses under the ordinance).

Additionally, in concluding that the ordinance provides "no standard of conduct at all," the Tennessee Supreme Court erred in ignoring the specific factors delineated by the trial court in determining whether sexually explicit material is a "substantial or significant," i.e., an important or non-trivial portion of the business's stock and trade. Pet. App. 100a (looking at percentage of sales, content of non-adult tapes, percentage of floor space, etc. "in determining whether there is a substantial or significant portion" of the business's stock and trade comprised of sexually explicit videos). These factors provide guidance to those - unlike Fantasy - who are seeking to conform their conduct to the ordinance, thus belying the Tennessee Supreme Court's conclusion that doing so is impossible. *State v. Hanna*, 901 So. 2d 201, 205 (Fla. Ct. App. 2005) (rejecting vagueness challenge to "adult bookstore" definition based upon factors similar to the ones employed by the trial court in this case).

Second, the Tennessee Supreme Court's decision is wrong because it requires cities to specify a percentage - a particular numerical portion - of inventory that will trigger an adult use classification.[1] This "mathematical precision" requirement is directly contrary to this Court's longstanding vagueness doctrine, *see Grayned*, 408 U.S. at 110, as well as state appellate decisions in this specific context. *See, e.g., Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 93 P.3d 633, 639 (Colo. Ct. App. 2004); *Golden Triangle News, Inc. v. Corbett*, 689 A.2d 974, 984-985 (Pa. Commw. Ct. 1997), *aff'd* 717 A.2d 1023 (Pa. 1998).

The requirement of specifying a percentage is also unwise, because it facilitates sham "compliance" of the kind that Fantasy attempted in this case. The trial court found that the general release videos - though greater in actual number than the sexually explicit videos - occupied considerably less floor space, consisted entirely of used stock, were not catalogued or displayed by category, and were generally "all mixed together" on the racks and in cardboard boxes on the ground. Pet. App. 100a. Such disingenuous attempts are common in the industry, and often succeed in circumventing the application of zoning regulations containing percentages even though the essential nature of the business remains unchanged. *See City of New York v. Hommes*, 94 N.Y.2d 267, 724 N.E.2d 368 (N.Y. 1999) (discussing manipulation of percentage standard to circumvent regulation); *see also For the People Theatres of N.Y., Inc. v. City of New York*, 20

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[1] Any argument that a percentage is not required by the Tennessee Supreme Court's decision rings hollow. The Court faulted the City for not providing the specific percentage that Fantasy sought to obtain so that it might succeed in what the trial court concluded was a "sham that defendant has tried to pass off as other than a business whose primary purpose is adult entertainment...." Pet. App. 101a.

A.D.3d 1, 793 N.Y.S.2d 356 (N.Y. App. Div. 2005) (upholding amendments to New York's ordinance that add non-mathematical factors to the "substantial portion" determination to avoid the circumvention identified in *Hommes*, *supra*). Such experiences demonstrate the flaw in specifying a percentage threshold and illustrate the *Golden Triangle* court's observation that: "Limiting the definition of 'adult bookstore' to establishments that meet a specific sales percentage would frustrate the Act's purpose by drawing arbitrary classifications." *Golden Triangle News v. Corbett*, 689 A.2d 974, 985 (Pa. Commw. Ct. 1997), *aff'd* 717 A.2d 1023 (Pa. 1998).

In short, the Tennessee Supreme Court's decision is at odds with both well-established constitutional doctrine and sound public policy, which permits "flexibility and reasonable breadth" in regulating sexually oriented businesses. The court relied on uncertainty at the ordinance's margins to invalidate the ordinance on its face even though it is clear what the statute proscribes "in the vast majority of its intended applications." *Hill v. Colorado*, 530 U.S. 703, 705 (2000). This Court should correct the Tennessee Supreme Court's error and clarify the vagueness standard to be applied to adult business zoning regulations.

III. The Question Presented is Important to Cities Across the Country.

Nearly thirty years ago, this Court rejected vagueness challenges to Detroit's adult business zoning regulation. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). Not surprisingly, hundreds of cities - including the City of Knoxville - modeled the definitions contained in their adult use zoning ordinances, including the definition of "adult bookstore," after the language employed by the Detroit

ordinance upheld in *Young*. *Id.* at 54 n.5 (using the "substantial or significant portion of its stock in trade" language invalidated herein); *see also, e.g., City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (using same language to define adult bookstore); *Renaissance Arcade & Bookstore v. County of Cook*, 473 U.S. 1322 (1985); *Phillips v. Borough of Keyport*, 107 F.3d 164 (3d Cir. 1997); *Central Ave. News, Inc. v. City of Minot*, 651 F.2d 565 (8th Cir. 1981).

Moreover, hundreds of communities[2] have employed the language struck by the Tennessee Supreme Court as facially invalid in this case. *See, e.g.*, Cincinnati, Ohio, Code § 899-1-A1 (2003); Kalamazoo, Mich. Code App. A § 1B.2(b) (2004); Henderson, Ky. Code § 2.5-2 (2002); Griffin, Ga. Code § 10-32 (2005); Lake Worth, Fla. Code § 23.02.03.00 (2005); Belmont, Cal. Code § 4-75(e) (2004); West Chicago, Ill. Code App. A, Art. IV (2005); Surfside Beach, S.C. Code § 17-298 (2005); Corpus Christi, Tex. Code § 48-2 (2005); Norfolk, Va. Code App. A § 2-3 (2005); Tonawanda, N.Y. Code § 82-381 (2004); Carthage, Mo. Code § 25-801(1) (2003); Bayport, Minn. Code § 10-51 (2005); Holyoke, Mass. Code App. A § 2 (2004); Bristol, Conn. Code § 13-102 (2005).

Because adult business ordinances in myriad cities around the country use *Young's* "substantial or significant portion" language to define "adult bookstore," the question presented

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[2] A review of city codes published online at www.municode.com – which is limited to cities that contract with that code publishing service – reveals more than 275 cities which use "substantial or significant" in order to define "adult bookstore" or "adult video store."

affects adult businesses and municipalities well beyond Knoxville and the State of Tennessee. As discussed above, cities from Tennessee to New York to California are in a conundrum of either adhering to *Young's* language and being forced to litigate the vagueness issue repeatedly, sometimes with severe consequences (damages), or specifying a percentage that will be manipulated to frustrate the legislation's valid purpose of zoning sexually oriented businesses to prevent their negative secondary effects upon communities. This Court should grant the writ, reverse the Tennessee Supreme Court's vagueness conclusion, and provide necessary guidance for cities and lower courts nationwide.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

September 27, 2005

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF TENNESSEE
AT KNOXVILLE

No. E2002-01143-SC-R11-CV

[Filed June 29, 2005]

CITY OF KNOXVILLE	)
	)
v.	)
	)
ENTERTAINMENT RESOURCES, LLC.	)
	)

Appeal by Permission
from the Court of Appeals Chancery Court
for Knox County
No. 140736-2
Daryl Fansler, Chancellor

E. RILEY ANDERSON, J., delivered the opinion of the court, in which ADOLPHO A. BIRCH, JR., JANICE M. HOLDER, and WILLIAM M. BARKER, JJ., joined. FRANK F. DROWOTA, III, C.J., filed a concurring opinion.

OPINION

We granted this appeal to determine the constitutionality of a Knoxville city ordinance regulating the location of adult businesses. The chancery court upheld the ordinance and enjoined operation of the defendant's video store after finding that it fit the definition of an adult bookstore and was located within 1,000 feet of prohibited areas and therefore was operating in violation of the ordinance. The Court of Appeals reversed on the grounds that the ordinance's definition of adult bookstores is unconstitutionally vague. Because we have also determined that the ordinance is unconstitutionally vague under the United States and Tennessee Constitutions, we affirm the decision of the Court of Appeals but on the separate grounds set forth herein. We remand to the trial court for an assessment of the amount of damages incurred by the defendant as a result of the chancery court's injunction.

In 1979, the Knoxville City Council adopted an ordinance regulating, among other things, the location of "adult businesses." At all times relevant to this appeal, Knoxville City Code section 16-468 ("the ordinance") provided that adult businesses could not be located within 1,000 feet of: a residentially-zoned district; an area devoted to recreational activity; or an establishment selling alcoholic beverages. The ordinance included adult bookstores in its definition of adult businesses. An adult bookstore was defined as:

> an establishment having as a substantial or significant portion of its stock and trade books, magazines and other periodicals, videotapes or other electronic media which are distinguished or characterized by their emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical

> areas, or an establishment with a segment or a section devoted to the sale or display of such material.

Knoxville City Code § 16-468(a) (emphasis added). The parties dispute whether the phrase "substantial or significant portion of its stock and trade" is impermissibly vague under the United States and Tennessee Constitutions.

Background

The City of Knoxville filed a complaint in Knox County Chancery Court seeking to enjoin the defendant, Entertainment Resources, from operating its store in alleged violation of the ordinance. The following facts were developed before the chancery court and stipulated by the parties.

On August 3, 1998, Entertainment Resources opened a store called Fantasy Video at 6422 Papermill Road in Knoxville, Tennessee. Entertainment Resources also operated two stores in Nashville and one in Columbia, Tennessee. It planned to open two Knoxville stores in addition to Fantasy Video.

Fantasy Video, like Entertainment Resources' other stores, rented and sold videotapes for off-site viewing. When Fantasy Video opened, its inventory consisted of 80% adult or sexually explicit, "X-rated" videos and 20% family or general videos. General videos were displayed in the store's "front room." Adult videos were displayed in the store's "back room," which was restricted to patrons 18 years of age and older.

Under the spacing provisions of the Knoxville ordinance, an "adult business" could not legally locate at the site of the

Fantasy Video store. It was stipulated that the site was located next door to the New Mexicali Rose restaurant, which sold beer and liquor; within 1,000 feet of a Boy Scouts administrative building, and within 1,000 feet (as the crow flies) of a residentially zoned district, although the residential district was separated from the store by Interstate 40. Entertainment Resources did not believe that the Boy Scouts building qualified as a building devoted to recreational activity and did not believe it was within 1,000 feet of a residential district. Although Entertainment Resources had full knowledge that the New Mexicali Rose restaurant sold beer and liquor, it chose to locate Fantasy Video on Papermill Road because its lawyer had advised the company that the Knoxville ordinance was unconstitutional.

Shortly after Fantasy Video opened in August 1998, the Knoxville Police Department began inspecting the store and issuing citations for violation of the ordinance on an almost daily basis. The citations alleged that Fantasy Video was an adult bookstore within the meaning of the ordinance because a substantial or significant portion of its stock and trade constituted videotapes containing material within the ambit of the ordinance.

In response to the citations, Entertainment Resources attempted to gain clarification from the police and from the City's law director as to what constituted a "substantial or significant" portion of stock and trade under the ordinance, but no guidance was provided.

At a hearing on some of the citations in Knoxville City Court, three of the officers involved in the inspections of Fantasy Video testified that they had received no guidance or training in interpreting the ordinance. When asked to define the terms in the ordinance, Sergeant Ferguson testified that he

could not define "substantial" other than, "substantial means substantial as red means red; I know red when I see it, but I can't describe red." He further testified that "significant to me means a quantity of something that, compared to something else [sic]." Officer Major testified that "substantial is substantial. I don't really have an opinion on the definition of substantial, it is self-explanatory." He further explained, "significant is just like substantial, I mean, significant is significant, just as substantial is substantial." Officer Shelton similarly testified that "substantial means substantial just like the color blue means the color blue. I can't provide any other [sic]." He also testified that "significant means significant." It was stipulated that if called to testify further, the officers would testify that in making the evaluation of "substantial" and "significant" they would look to what appeared to them to be the "important part of the business."

By November 1998, Entertainment Resources had altered the composition of Fantasy Video's inventory. A police inventory on November 17, 1998, revealed that approximately 57% of the stock was general feature videos and approximately 43% of the stock was adult-oriented videos. The balance was later adjusted again; the tally from a count on December 8, 1998, was 70% general feature and 30% adult feature. Despite these alterations, the City police continued to issue citations up until the date that the preliminary injunction was entered. As of November 1998, Entertainment Resources had been cited and found guilty of fifty-three separate violations of the ordinance. As of November 16, 1998, at least 75% of Fantasy Video's revenues were generated by the "back room" videos.

The record indicates that at least one other business in Knoxville rents and sells videos that fall within the purview of the ordinance. It was stipulated that Gemstone Video Stores

have separate back rooms devoted to adult-oriented videotapes and magazines. It was stipulated that the City takes the position that Gemstone Video Stores are not "adult bookstores" within the meaning of the ordinance and that the back room stock is not a substantial or significant portion of Gemstone Video's stock and trade, but the record does not show the percentage breakdown between adult videos and general videos.

In spite of the repeated citations, Entertainment Resources continued to operate Fantasy Video. Therefore, on November 4, 1998, the City of Knoxville filed a complaint for injunctive relief seeking to enjoin Entertainment Resources from operating in violation of the ordinance. In its answer, Entertainment Resources averred numerous defenses, including the claim that the ordinance is impermissibly vague under the United States and Tennessee Constitutions.

On December 10, 1998, the chancery court granted the City's motion for a temporary injunction restraining Entertainment Resources from operating an adult bookstore at the Papermill Road location. The chancery court reasoned that a temporary injunction was appropriate because Entertainment Resources had opened the Fantasy Video store on Papermill Road with full knowledge of the ordinance, and it was not disputed that the adult videos offered for sale and rental at Fantasy Video were within the purview of the ordinance. The chancery court further noted that over 75% of the store's revenue and at least 85% of its customers were attributable to the adult videos. The court opined that the general video inventory was, "despite its number . . . insignificant and insubstantial to this business's stock in trade."

For two years after the entry of the temporary injunction there was little movement on the merits of the case. Fantasy Video's general video business eventually dwindled to the point that it was only open two hours per week. In January 2001, Entertainment Resources lost its lease on the Papermill Road location and the City moved to dismiss the suit as moot. The chancery court granted that motion on July 9, 2001, except with respect to Entertainment Resources' claim for damages. Entertainment Resources argued that it was entitled to damages not only as to the Fantasy Video store, which had only operated for four months on Papermill Road prior to entry of the injunction, but also as to the two additional stores it had planned to open in Knoxville.

Nine months later, on April 15, 2002, the chancery court entered an order upholding the injunction and denying damages. The court held that because Entertainment Resources was in "direct violation" of the ordinance, it was not entitled to challenge it as vague. The court also held that the ordinance was a constitutional time, place and manner restriction aimed at combating the secondary effects of adult businesses.

Entertainment Resources appealed. The Court of Appeals reversed the chancery court, reasoning that because neither the City nor the enforcing officers could define the terms "substantial" or "significant," and because the imprecision of the terms prevented "'men of common intelligence'" from understanding the ordinance, the ordinance was "unconstitutionally vague and, therefore, unenforceable." The Court of Appeals remanded to the trial court for a determination of damages and attorney's fees. The appellate court rejected the City's argument that Entertainment Resources' damages as to the Fantasy Video store were too speculative for recovery. The court declined, however, to

instruct the trial court to award damages for the second and third planned, but unopened, stores, finding that those damages were too speculative to permit recovery. We granted review and now affirm the Court of Appeals on the separate grounds set forth below.

Analysis

Standard of Review

Interpretation of statutes and ordinances is a question of law which we review de novo. *See State ex rel. Pope v. U.S. Fire Ins. Co.*, 145 S.W.3d 529, 533 (Tenn. 2004).

The Vagueness Doctrine

The Fourteenth Amendment to the United States Constitution prohibits states from "depriving any person of life, liberty, or property, without due process of law." Article I, section 8 of the Tennessee Constitution provides an identical protection; as we have often observed, "the 'law of the land' proviso of our constitution is synonymous with the 'due process of law' provisions of the federal constitution." *State ex rel. Anglin v. Mitchell*, 596 S.W.2d 779, 786 (Tenn. 1980) (citing *Daugherty v. State*, 216 Tenn. 666, 393 S.W.2d 739 (Tenn. 1965)).

Due process of law requires, among other things, notice of what the law prohibits. Laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Criminal statutes "must 'define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited . . . .'" *Davis-Kidd Booksellers, Inc. v.*

McWherter, 866 S.W.2d 520, 532 (Tenn. 1993) (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)). A statute is unconstitutionally vague, therefore, if it does not serve sufficient notice of what is prohibited, forcing "'men of common intelligence [to] necessarily guess at its meaning.'" *Davis-Kidd*, 866 S.W.2d at 532 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973)); *see also Leech v. Am. Booksellers Ass'n, Inc.*, 582 S.W.2d 738, 746 (Tenn. 1979).

In addition to the requirement of notice, the vagueness doctrine requires that statutes provide "minimal guidelines to govern law enforcement." *Davis-Kidd*, 866 S.W.2d at 532. Because "[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application," *Grayned*, 408 U.S. at 108-09, "the requirement that a legislature establish minimal guidelines to govern law enforcement" is the more important aspect of the vagueness doctrine. *Smith v. Goguen* 415 U.S. 566, 574 (1974).

Vague laws implicating the First Amendment to the United States Constitution and Article I, section 19 of the Tennessee Constitution are subject to a more stringent standard than laws in other contexts because of the danger of chilling protected speech. *Davis-Kidd*, 866 S.W.2d at 531. "Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts." *Smith*, 415 U.S. at 573.[1]

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[1] The concurring opinion suggests that this is a case involving an overbreadth analysis. The issue before this Court, however, is not whether the ordinance reaches both protected and unprotected

With these principles in mind, we turn to the question of whether the ordinance is unconstitutionally vague.

Validity of the Ordinance

The City argues that the terms "substantial" and "significant" are familiar terms capable of ready understanding by persons of ordinary intelligence. Moreover, argues the City, we must construe "substantial" and "significant" in the context of the statute as a whole. Entertainment Resources argues that "substantial" and "significant" are unconstitutionally vague because the terms have no fixed meaning.

In evaluating a law, such as the Knoxville ordinance, that "affects communication protected by the First Amendment," we may consider a challenge to its facial validity regardless of whether or not the law is vague as applied to the defendant if "the statute's deterrent effect on legitimate expression is . . . both real and substantial and if the statute is [not] readily subject to a narrowing construction by the state courts." *Young v. Am. Mini-Theaters*, 427 U.S. 50, 60 (1976) (internal quotations omitted);[2] *see also U. S. v. Mazurie*, 419 U.S.

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conduct, but whether the ordinance is unclear in its prohibitions. Although "vagueness and overbreadth [are] logically related and similar doctrines," *Kolender*, 461 U.S. at 358 n.8, they are distinct concepts. *See, e.g., Davis-Kidd*, 866 S.W.2d at 523-29, 531-32.

[2] The concurring opinion notes that the Court in *Young* refused to consider the defendants' vagueness challenge because the challenged ordinances "unquestionably" applied to the defendants. The Court so held, however, only *after* first concluding that the ordinances at issue did not create a significant deterrent effect and were "readily subject to a narrowing construction by the state

544, 550 (1975); *NAACP v. Button*, 371 U.S. 415, 432-33 (1963). Here, the deterrent effect was indeed substantial; Entertainment Resources was forced to close its doors and abandon its plans to open a second and third store. Moreover, as we explain below, the ordinance is not susceptible to a narrowing construction. For the reasons that follow, we conclude that the Knoxville ordinance is vague and invalid on its face.

First, the inability of the officers charged with enforcing the ordinance to define its key terms weighs heavily against the ordinance's constitutionality. Knoxville Police Officers Ferguson, Major, and Shelton all testified that they were unable to define "substantial." The officers testified that the City had not instructed them as to what constituted a substantial portion of sexually-explicit material but that they, personally, knew what "substantial" meant. As Entertainment Resources points out, however, "I know it when I see it" is not a constitutionally-sound standard. Particularly when speech is being regulated, the Constitution demands that government bodies make a greater attempt to define what conduct is prohibited to avoid chilling protected speech.

As written, the determination of what constitutes a "substantial or significant portion" of a business's "stock and trade" under the ordinance is an entirely subjective one. The ordinance gives no objective guidance to businesses regulated

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courts." *Young*, 427 U.S. at 60-61. The concurring opinion also notes that the ordinance upheld by the Court in *Young* contained the same "substantial or significant" definition with regard to adult bookstores as does the Knoxville ordinance we consider here. However, *Young* addressed a challenge to an entirely separate section of the ordinance, and the Court in Young did not pass on the constitutionality of the definition at issue in this case.

by the ordinance or officials charged with its enforcement. "Accordingly, it neither gives notice to ordinary people . . . nor sufficient guidance to law enforcement officials to prevent arbitrary law enforcement." *Davis-Kidd, 866 S.W.2d at 532.* This type of vague, "standardless" drafting is precisely what the Due Process clause prohibits, because it "allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law." *Smith*, 415 U.S. at 575.

We note that the City objects to using the testimony of Officers Ferguson, Major, and Shelton to demonstrate that the ordinance is unconstitutionally vague. The City points out that the content, meaning and application of the ordinance is not a matter of fact to be proven by witness testimony but is rather a matter of law to be construed by the Court. *State ex rel. Pope*, 145 S.W.3d at 533; *see also Dempsey v. Correct Mfg. Corp.*, 755 S.W.2d 798, 806 (Tenn. Ct. App. 1988). As the Court of Appeals correctly held, however, here the witnesses' testimony illustrates the issue at the very heart of the vagueness challenge: enforcement of the ordinance was left to the "personal predilections" of the police. *Smith*, 415 U.S. at 575. The officers' confusion demonstrates that the ordinance fails to provide ascertainable standards for law enforcement.

Second, the terms as used in the context of the ordinance cannot be defined with any degree of precision. In our view, the fact that the terms "substantial" and "significant" are common and familiar terms does not support the argument that they are constitutional as used in the ordinance. The words "big" and "small" are certainly common and familiar as well, but if used to describe prohibited conduct, they would no more pass constitutional muster than do the terms in this

ordinance. For it is not the words themselves that must be capable of ready understanding by persons of ordinary intelligence, but the *conduct that is prohibited* that must be readily understood.[3]

To bolster its argument that "substantial" and "significant" are constitutional when used in statutes, the City points out that the terms appear hundreds of times in state and federal statutes. *See 15192 Thirteen Mile Rd., Inc. v. City of Warren*, 626 F. Supp. 803, 820 (E.D. Mich. 1985). As the City itself notes, however, we must read those terms in the context of the ordinance. The terms "substantial" and "significant" in this ordinance merely tell us that if a business has a certain, undefined amount of sexually-explicit material, then it is subject to the location restrictions of the ordinance. What is "substantial" or "significant" to one person may just as easily be "unsubstantial" or "insignificant" to another. The fact that the City itself was unsure what amount of material the terms were intended to reach is demonstrated both by the City's failure to offer guidance to Entertainment Resources and by the confusion of the officers charged with enforcing the ordinance.

Third, the City declined to give any limiting construction to the ordinance, and we are unable to impose a narrowing

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[3] The concurring opinion asserts that "substantial" is capable of definition, noting that this Court defined "substantial" in *In re Valentine*, 79 S.W.3d 539, 548-49 *(Tenn. 2002)*. The definition of substantial offered in that case was "'of real worth and importance.'" *Id.* at 548 (quoting *Black's Law Dictionary 1428* (6th ed. 1990)). It is difficult to see how substituting "of real worth and importance" for "substantial" would clarify what portion of adult-oriented stock and trade a business could carry without being subject to the ordinance.

definition to salvage its constitutionality. As the concurring opinion notes, this Court has cautioned that "[c]ourts should consider any limiting instructions of the challenged statute that state authorities have proffered." *State v. Burkhart*, 58 S.W.3d 694, 697 (Tenn. 2001). In this case, however, no such instruction has been proffered, either to Entertainment Resources or to this Court. Entertainment Resources requested that the City tell it how to reapportion its stock in order to comply with the ordinance. The City refused. Entertainment Resources then altered the composition of the Fantasy Video stock from 80% adult-oriented material to 57%, and finally to 30%. After each alteration, the City continued to maintain that Fantasy Video was in violation of the ordinance. In our view, requiring a party to engage in this sort of guessing game is a clear violation of due process. The "absence of any ascertainable standard for inclusion and exclusion is precisely what offends the Due Process Clause." *Smith*, 415 U.S. at 578.

The concurring opinion states that we failed to "consider whether the ordinance is readily susceptible to a narrowing construction which would alleviate any perceived unconstitutional vagueness." But in the absence of any hint from the City, we are at a loss as to how to impart meaning to the terms "substantial" and "significant" without rewriting the ordinance. The concurring opinion points out that a similar Nashville ordinance defines an adult video store as an "establishment having a majority of its stock or a majority of its floor space dedicated to" adult material. A previous version of that ordinance, invalidated as unconstitutionally vague in *Ellwest Stereo Theater, Inc. v. Boner*, 718 F. Supp. 1553, 1581 (M.D. Tenn. 1989), had used the terms "substantial" and "significant." While we agree that "majority" is clearer than "substantial," such a drastic revision by this Court would amount to impermissible judicial

legislation. "Courts may supply words when reasonably called for. Nevertheless, it is the prerogative of the legislature, and not the courts, to amend statutes." *In re Swanson, 2 S.W.3d 180, 186-87 (Tenn. 1999)* (citations omitted). In the Nashville case, it was the Nashville City Council, a legislative body, that supplied the narrowing construction, not the courts.

It is difficult to understand the City's reluctance to further clarify the ordinance. "Although due process does not require impossible standards of clarity, this is not a case where further precision in the statutory language is either impossible or impractical." *Kolender*, 461 U.S. at 361 (internal quotation and citation omitted). Surely the City must have had some idea of what amount of sexually-explicit material was tolerable under the ordinance, particularly given the fact that the record shows that the City takes the position that Gemstone Video Stores, which also stock sexually-explicit videotapes, was not in violation of the ordinance. *See, e.g., Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 503-04 (1982) (ordinance regulating sale of drug paraphernalia not vague, in part because village attorney issued guidelines to businesses affected by ordinance).

In the absence of any articulable standards from the City, we must conclude that the ordinance is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971).

Finally, the City argues that Entertainment Resources may not challenge the ordinance as facially vague because the Fantasy Video store was clearly within the purview of the ordinance. *Burkhart*, 58 S.W.3d at 699. As we have explained, however, in some circumstances even a party who

is within the ambit of an ordinance may challenge it as facially vague if protected communication is at issue. *Young*, 427 U.S. at 59-60. Moreover, the facts of this case belie the City's insistence that Entertainment Resources fell within the purview of the ordinance, because, as we have explained, the ordinance has no boundaries. Entertainment Resources reduced its stock from 80% adult videos to 30% without, evidently, locating the upper edge of what constituted an acceptable portion of stock devoted to adult-oriented material. Given the City's inability to articulate any constitutionally-meaningful standards for the ordinance's definition of adult bookstores, we conclude that the ordinance is unconstitutionally vague and unenforceable.

Remaining Issues

Having determined that the definition of "adult bookstores" in Knoxville City Code section 16-468 is void for vagueness, we need not reach the parties' arguments as to the validity of the injunction entered by the trial court. We also decline to reach Entertainment Resources' arguments that such an ordinance is not a valid time, place and manner regulation, that it failed to provide reasonable alternative avenues of communication, that such an ordinance may never be justified using the "secondary effects" doctrine under Article 1, section 19 of the Tennessee Constitution, and that the injunction was an unconstitutional prior restraint.

Damages

Because the chancery court held that Entertainment Resources had been properly enjoined from operating Fantasy Video pursuant to the ordinance, it did not address Entertainment Resources' damages. We agree with the Court of Appeals that Entertainment Resources is entitled to a

determination of damages as to the Fantasy Video Store on Papermill Road, but that it is not entitled to damages as to the planned, but unopened, second and third Knoxville stores. We remand to the chancery court to assess the amount of Entertainment Resources' damages and to determine the propriety of awarding attorney's fees.

Conclusion

Having considered the record and applicable authority, we hold that Knoxville City Code section 16-468 is vague and unenforceable under the United States and Tennessee Constitutions. We remand to the chancery court for a determination of Entertainment Resources' damages flowing from that court's injunction. Costs of the appeal are taxed to the appellant, City of Knoxville, and its surety, for which execution may issue if necessary.

/s/_____
E. RILEY ANDERSON, JUSTICE

CONCURRENCE

FRANK F. DROWOTA, III, C.J., concurring in results.

I concur with the result reached by the majority. However, I am unable to join the majority's analysis and conclusion that Knoxville Code section 16-468 ("the Ordinance") is unconstitutionally vague on its face. In my view, we need not and should not consider whether the Ordinance is unconstitutionally vague on its face because this appeal may be resolved on the basis that it was unconstitutionally vague as applied to Fantasy Video.

I. Vague As Applied

When Fantasy Video opened on August 3, 1998, its inventory consisted of 80% adult or sexually explicit, x-rated videos and 20% family or general videos. After police officers for the City of Knoxville ("City") began inspecting the store and issuing citations on an almost daily basis, Entertainment Resources changed the inventory and layout of Fantasy Video in an attempt to avoid continued classification as an adult bookstore under the Ordinance. A November 17, 1998, police inventory revealed that Fantasy Video's stock consisted of 57% general feature videos and 43% sexually explicit adult-oriented videos. The tally from a December 8, 1998, count revealed that Fantasy Video's stock consisted of 70% general feature videos and 30% sexually explicit adult-oriented videos. Thus, Entertainment Resources attempted to alter the balance of its inventory to avoid the reach of the Ordinance.

Entertainment Resources also sought guidance from various officials of the City of Knoxville as to what specific additional changes would be necessary for Fantasy Video to

avoid the adult bookstore classification so that it could lawfully operate at the Papermill Road location without being subject to the Ordinance's restrictions. Neither the police who conducted inspections and issued citations to Fantasy Video nor the City's Law Department or the City Court judge assigned to hear the citations provided the guidance that Entertainment Resources sought.[1] In addition to seeking a declaratory judgment finding the Ordinance unconstitutional, Entertainment Resources sought in its counterclaim a declaratory judgment construing "adult bookstore" in a manner that would make it possible to know what additional changes would be necessary for Fantasy Video to avoid the adult bookstore classification and to operate lawfully at the Papermill Road location. The injunction did not provide additional guidance but instead merely enjoined Entertainment Resources "during the pendency of this action from operating an adult bookstore at 6422 Papermill Road, Knoxville, Tennessee." Thus, upon reviewing the facts and procedural history of this case, I am fully convinced that the Ordinance is unconstitutionally vague as it has been applied to Fantasy Video; therefore, I concur with the result reached by the majority.

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[1] Why the City failed to provide guidelines to businesses affected by the Ordinance is unclear, particularly when the United States Supreme Court has considered such guidelines relevant in rejecting a vagueness challenge to an ordinance. *See, e.g., Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 503-04 (1982). The City's refusal to respond to Entertainment Resources specific requests for guidance also is inexplicable. As the majority points out, the City must have had some notion of what amount of sexually-explicit material was tolerable under the Ordinance because the City had taken the position that Gemstone Video Stores was not in violation of the Ordinance.

II. Facial Vagueness Challenge

Having concluded that this appeal may be resolved on the basis of how the Ordinance has been applied, I cannot agree with the majority decision holding the Ordinance vague on its face and thus unconstitutional in all its applications. This Court has recognized that "'[a] facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully since the challenger must establish that no set of circumstances exist under which the Act would be valid.'" *Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520, 525 (Tenn. 1993)* (quoting *United States v. Salerno*, 481 U.S. 739, 745(1987)). Striking down a statute on its face therefore is "'strong medicine'" which should be employed "'with hesitation, and then only as a last resort.'" *Id.* (quoting *New York v. Ferber*, 458 U.S. 747, 769 (1982)). Administering such "strong medicine" is not necessary in this appeal because, as previously explained, the record illustrates that the Ordinance has been unconstitutionally applied to Fantasy Video.

Nonetheless, the majority states: "In evaluating a law, such as the Knoxville ordinance, that is capable of reaching protected expression, we inquire only whether the law is vague on its face. We need not consider whether it is vague as applied to the defendant. *NAACP v. Button,* 371 U.S. 415, 432-33 (1963); *see also U. S. v. Mazurie*, 419 U.S. 544, 550, (1975). First, the decisions cited in support of the majority's statement predate United States Supreme Court decisions which appear to require precisely the opposite analysis. For example, in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 59-61(1976), the Court began its analysis by considering

whether the challenged Detroit ordinance[2] was vague as applied to the defendants, stating:

> It is clear, therefore, that any element of vagueness in these ordinances has not affected these respondents. To the extent that their challenge is predicated on inadequate notice resulting in a denial of procedural due process under the Fourteenth Amendment, it must be rejected.

Young, 427 U.S. at 59. Only *after* considering and rejecting the as-applied vagueness challenge did the Court consider and also reject the facial vagueness challenge. The Court explained:

> We are not persuaded that the Detroit zoning ordinances will have a significant deterrent effect on the exhibition of films protected by the First

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[2] Notably, the Ordinance Entertainment Resources challenges as unconstitutionally vague in this appeal uses language identical to that in the Detroit ordinance at issue in *Young*, which defined "adult bookstore" as "[a]n establishment having as *a substantial or significant portion of its stock in trade*, books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas' (as defined below), or an establishment with a segment or section devoted to the sale or display of such material." *Young*, 427 U.S. at 53 n.5 (emphasis added). Unlike the majority, the United States Supreme Court in *Young* refused to find this language unconstitutionally vague, stating "the only vagueness in the ordinances relates to the amount of sexually explicit activity that may be portrayed before the material can be said to be 'characterized by an emphasis' on such matter." *Id.* at 61.

> Amendment. As already noted, the only vagueness in the ordinances relates to the amount of sexually explicit activity that may be portrayed before the material can be said to be "characterized by an emphasis" on such matter. For most films the question will be readily answerable; to the extent that an area of doubt exists, we see no reason why the ordinances are not "readily subject to a narrowing construction by the state courts." Since there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance, and since the limited amount of uncertainty in the ordinances is easily susceptible of a narrowing construction, we think this is an inappropriate case in which to adjudicate the hypothetical claims of persons not before the Court.

Young, 427 U.S. at 60-61. Thus, the Court in *Young* did not consider the facial vagueness challenge until it had first considered and rejected the as-applied vagueness challenge.

Furthermore, I do not believe the cited authority supports the proposition for which it has been cited. The Court in *Button* stated:

> We have no doubt that the opinion of the [Virginia Supreme Court] in the instant case was intended as a full and authoritative construction of Chapter 33 *as applied in a detailed factual context*. That construction binds us. For us, the words of Virginia's highest court are the words of the statute. [citation omitted] We are not left to speculate at large upon the possible implications of bare statutory language.

371 U.S. at 432 (emphasis added); *see also Mazurie*, 419 U.S. at 550. Neither *Button* nor *Mazurie* involved facial constitutional challenges to zoning ordinances of the type at issue in this appeal. Indeed, constitutional challenges to such ordinances are evaluated pursuant to a distinct First Amendment analysis. *See, e.g., City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984)).

Moreover, the majority's willingness to hold the Ordinance facially unconstitutional cannot be justified as a proper application of the overbreadth doctrine.[3] The overbreadth doctrine is an exception to normal standing principles which, despite the general rule disfavoring facial constitutional challenges, permits a litigant "to challenge the [facial] constitutionality of a statute which *is not unconstitutional as applied* but which may be unconstitutional in some cases in order to protect the right of free speech." 16 Am. Jur. 2d *Constitutional Law* § 140 (1998) (emphasis added); *see also Davis-Kidd Booksellers, Inc.*, 866 S.W.2d at 525. However, the overbreadth doctrine does not dispense with the general principle that courts consider facial challenges to the constitutionality of statutes only as a last resort. Indeed, "the [overbreadth] doctrine should be applied sparingly and used only as a last resort. And for it to apply,

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[3] Although the majority expressly disavows reliance upon the overbreadth doctrine, at page thirteen, the majority, quoting *Young*, sets out the standard that it later applies to strike down the Ordinance, and this is the same standard applied by courts to evaluate overbreadth challenges. *See Young*, 427 U.S. 50 at 59 n.17 (citing cases and discussing the circumstances in which the Court had considered facial overbreadth challenges even though the statutes had been constitutionally applied to the challengers).

there must be a realistic danger that the statute will significantly compromise the recognized First Amendment rights of persons not before the court." 16 Am. Jur. 2d Constitutional Law § 140 (1998); *see also Davis-Kidd Booksellers, Inc.*, 866 S.W.2d at 525. In this appeal, the "last resort" overbreadth doctrine need not be applied because the case may be resolved by finding that the Ordinance has been unconstitutionally applied to Entertainment Resources.

Even assuming it were necessary to evaluate Entertainment Resources' facial vagueness challenge to the constitutionality of the Ordinance, I would be unable to agree with the analysis which the majority employs and the result which the majority reaches. Before a statute is held unconstitutionally vague on its face, courts have a duty to consider whether the challenged law is "readily susceptible" to a narrowing construction that would make it constitutional, and if so, courts have a duty to adopt the narrowing construction and to uphold the constitutionality of the statute. *Davis-Kidd Booksellers, Inc.*, 866 S.W.2d at 529.

> A statute is not vague which by orderly processes of litigation can be rendered sufficiently definite and certain for purposes of judicial decision. Courts should consider any limiting instructions of the challenged statute that state authorities have proffered. In fact, it is the duty of the courts to adopt a construction which will sustain a statute and avoid constitutional conflict if its recitation permits such a construction.

State v. Burkhart 58 S.W.3d 694, 697-98 *(Tenn. 2001)* (internal quotations and citations omitted). When determining whether an ordinance is unconstitutionally vague, courts must consider any regulatory refinements or limiting constructions.

See Village of Hoffman Estates, 455 U.S. at 494 n. 5; *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972); *see also*, *State v. Lyons*, 802 S.W.2d 590, 592 (Tenn. 1990) (rejecting the facial vagueness challenge by adopting and applying to a Tennessee statute the interpretation of "lawful order" which the New York Court of Appeals had adopted and applied to a similar New York statute).

Rather than proffering a limiting instruction, the City has maintained that the Ordinance is constitutional without a limiting instruction because the terms "substantial" and "significant" are words ordinarily used and easily understood by "men of common intelligence." The City has argued that when the challenged phrase is considered "in the context of the Ordinance as a whole, and in light of other cases construing the phrase, the phrase cannot be said to be devoid of meaningful legislative standards." In support of its assertions, the City has pointed to other cases which have rejected vagueness challenges to language identical or nearly identical to the language at issue in this appeal. *See, e.g. Golden Triangle News, Inc. v. Corbett*, 689 A.2d 974, 984-985 (Pa. Commw. Ct. 1997)("[T]he terms 'substantial' and 'significant' have recognized meanings in the English language and the use of such in the definition of 'adult bookstore' does not render it vague merely because a percentage of business in one type of item is not specified."); *City of Chicago v. Scandia Books, Inc.*, 102 Ill. App. 3d 292, 430 N.E.2d 14, 18, 58 Ill. Dec. 72 (Ill. Ct. App. 1981) ("In support of their claim that the provision of the Ordinance which defines adult bookstores is vague, defendants point to the words, 'substantial or significant' as being unconstitutionally vague. We find defendants' argument without merit. The word, 'substantial' as used in the definition of adult bookstores is not so indefinite as to render the Ordinance void and unenforceable. That term has been

construed as having an ascertainable meaning in numerous statutory schemes. (citations omitted)"); *Mom N Pops, Inc. v. City of Charlotte*, 979 F. Supp. 372, 393 (W. D. N. C. 1997) ("Applying th[e] reasoning [of *Young*] to the challenged phrases, construing them in light of this detailed ordinance as a whole, and in light of cases either construing those very phrases or affording principles for so doing, the undersigned concludes that the challenged definitions and phrases are not devoid of meaningful legislative standards and are reasonably specific and precise, 'bearing in mind that unavoidable imprecision is not fatal and celestial precision is not necessary.'"). Additionally, the City has pointed out that the Ordinance uses the exact same terminology which many state and federal statutes employ. As the City notes in its brief, the word "substantial" appears 419 times in the Tennessee Code and the word "significant" appears 221 times. Similarly, the terms "substantial" and "significant" each appear over 2,000 times in the United States Code. For all these reasons, the City maintains that the Ordinance is not unconstitutionally vague.

The City is correct in its assertion that the terms used in the Ordinance are commonly used in many statutes and ordinances. As a result, courts have often applied context-appropriate definitions to these terms. *See* 38 Tenn. Digest 2d. *Substantial* (West 1999 & Supp 2004) (citing cases which defined the terms "substantial," "substantial abuse," "substantial and material evidence," "substantial and material change in circumstances," "significant part," and "significant state involvement").

Indeed, this Court recently defined the word "substantial" by referencing *Black's Law Dictionary*. *See In re Valentine*, 79 S.W.3d 539, 548-49 (Tenn. 2002). We adopted a meaning

appropriate to the context of the statute in which the term had been used, stating as follows:

> Substantial noncompliance is not defined in the termination statute. The statute is clear, however, that noncompliance is not enough to justify termination of parental rights; the noncompliance must be substantial. Black's Law Dictionary defines "substantial" as "[o]f real worth and importance." *Black's Law Dictionary* 1428 (6th ed. 1990). In the context of the requirements of a permanency plan, the real worth and importance of noncompliance should be measured by both the degree of noncompliance and the weight assigned to that requirement. Terms which are not reasonable and related are irrelevant, and substantial noncompliance with such terms is irrelevant.

Id. I agree with the majority that this definition of "substantial" makes little sense in the context of the Ordinance. That is true because "the background, purpose, and general circumstances under which words are used in a statute must be considered, and it is improper to take a word or a few words from its context and, with them isolated, attempt to determine their meaning." *Eastman Chemical Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004). However, our willingness to apply a context-appropriate definition to one of the terms which appears in the Ordinance suggests that the challenged terms are "readily susceptible" to context-appropriate narrowing definitions which would alleviate any perceived unconstitutional vagueness. *See, e.g., Lyons*, 802 S.W.2d at 592 ("The concept of 'lawfulness' is not inherently unconstitutionally vague, and people of common intelligence need not always guess at what a statute means by 'lawful' inasmuch as that term must be considered in the context of the

statements of law contained in relevant statutes and court rulings."). Given the common usage of these terms and the fact that this Court, and other courts, have applied context-appropriate definitions, the majority's conclusion that the Ordinance is not "readily susceptible" to a limiting, context-appropriate construction is puzzling. *See State v. Netto*, 486 S.W.2d 725, 729-30 (Tenn. 1972) (rejecting the facial vagueness challenge and stating that the statute used "ordinary terms to express ideas which find adequate usage and understanding. The use of common experience as a glossary is necessary to meet the practical demands of legislation.").

Indeed, even Entertainment Resources recognizes that any perceived vagueness problem in the Ordinance could have been cured. As an example of "constitutionally sufficient" specificity, Entertainment Resources points to a Nashville zoning ordinance which defines "Adult video store" as "a commercial establishment having a majority of its stock or a majority of its floor space dedicated to adult videos." In my view, the phrase, "substantial or significant portion of its stock and trade," used in the City's Ordinance is readily susceptible to a narrowing construction similar to the definition used in the Nashville ordinance. Indeed, construing the phrase "substantial or significant portion of its stock and trade" to mean "a majority portion of its stock and trade" would be wholly consistent with the commonly recognized meanings of the terms used in the Ordinance and would hardly constitute a "drastic revision," as the majority suggests.[4]

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[4] *See, e.g., Webster's Third New Int'l Dictionary of the English Language Unabridged*, 1768, 2116, 2280 (Philip Babcock Gove ed. 1971) (defining "substantial" as "considerable in amount, value, or worth"; defining "significant" as "important, weighty, notable"; and defining "portion" as "a part of a whole").

III. Conclusion

Although I agree with the majority that "this is not a case where further precision in the statutory language is either impossible or impractical," *Kolender v. Lawson*, 461 U.S. 352, 361 (1983), in my view, we need not and should not consider whether the Ordinance is unconstitutionally vague on its face. This appeal can and should be resolved on the basis that the Ordinance was unconstitutionally vague as applied to Fantasy Video. Even assuming it were necessary to consider the facial vagueness challenge, I would be unable to agree with the majority's analysis and conclusion because I am of the opinion that the Ordinance is readily susceptible to a narrowing construction. For all these reasons, I concur only in the result reached by the majority.

/s/_____
FRANK F. DROWOTA, III,
CHIEF JUSTICE

APPENDIX B

COURT OF APPEALS OF TENNESSEE AT KNOXVILLE

No. E2002-01143-COA-R3-CV

[Filed November 21, 2003]

CITY OF KNOXVILLE	)
	)
v.	)
	)
ENTERTAINMENT RESOURCES, LLC.	)
	)

Appeal from the Chancery Court for Knox County
No. 98-140736-2
Daryl Fansler, Chancellor

HOUSTON M. GODDARD, P.J., delivered the opinion of the court, in which HERSCHEL P. FRANKS and CHARLES D. SUSANO, JR. JJ., joined.

OPINION

Entertainment Resources, LLC., (hereinafter "Entertainment Resources"), owns and operates a number of videotape movie rental stores in Nashville. In 1998 Entertainment Resources formulated a plan to open three such stores in Knoxville at approximate three month intervals. In

accordance with this plan, in August of 1998, Entertainment Resources opened a store on Papermill Road in Knoxville under the name "Fantasy Video" and began selling and renting videotapes for home viewing. The front room of the store was stocked with a mix of videotapes rated G, PG-13, and R, as well as un-rated videotapes, while the back room of the store was stocked with sexually explicit X-rated videotapes.

At all times relevant to this case Knoxville Code section 16-468 (hereinafter also referred to as "the ordinance") was in effect providing in pertinent part as follows:

Sec. 16-468. Location of adult businesses.

(a) For the purpose of this section, the following words and phrases shall have the meanings ascribed to them in this subsection:

Adult bookstore means an establishment having as a substantial or significant portion of its stock and trade books, magazines and other periodicals, videotapes or other electronic media which are distinguished or characterized by their emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas, or an establishment with a segment or a section devoted to the sale or display of such material.

Adult business means any of the following businesses: adult bookstore, adult motion picture theatre, adult mini motion picture theatre, and adult cabaret.

...

(b) It shall be unlawful to establish, operate or maintain any adult business, that is, adult bookstore, adult motion picture theatre, adult mini motion picture theatre or adult cabaret, within the city, if the proposed location is within one thousand (1,000) feet of:

(1) A residentially zoned district;

(2) Any area of amusement which caters to family entertainment;

(3) Any area which is devoted in part or exclusively to recreational activity;

(4) Any school, park, church, mortuary or hospital;

(5) Any adult businesses as defined by this section; or

(6) Any other regulated use, including but not limited to establishments authorized to sell any alcoholic beverages for on-or off-premises consumption.

Knoxville Police Department officers began conducting almost daily inspections of Fantasy Video from the date of its opening and on each inspection issued citations charging violations of the ordinance. It is stipulated that, at the time these citations were issued, Fantasy Video was located within one thousand feet of a residentially zoned district separated from the store by Interstate-40 and also within one thousand feet of an establishment licensed to sell liquor and a Boy Scouts office. However, it is also stipulated that Vince

Bohanan, the managing member of Entertainment Resources who conducted a search of available locations in Knoxville, was not able to find a location where he could place the store that did not appear to be within one thousand feet of an establishment that sold liquor or beer and, at the time, he believed that the term "alcoholic beverages" included beer as well as liquor. It is further stipulated that Mr. Bohanan was not aware that the City would consider the store to be within one thousand feet of a residentially zoned district which was on the other side of Interstate-40 or that the City would consider the Boy Scouts administrative office to be a place devoted in part or exclusively to recreational use.

Following the opening of the store on Papermill Road, Entertainment Resources attempted on several occasions to avoid classification as an "adult bookstore" by reducing its stock of sexually explicit videotapes, by purchasing additional general release videotapes at a cost of $15,000.00, acquiring additional front room movie display shelves at a cost of $3,000.00 and by moving a wall at a cost of $1,500.00 to reduce the portion of square footage store space in the back room and increase the square footage of the front room portion of the store.

On November 4, 1998, the Appellee, City of Knoxville, hereinafter "the City", filed a complaint in the Knox County Chancery Court requesting that temporary and permanent injunctions be issued against Entertainment Resources. The complaint asserts that, in operating Fantasy Video, Entertainment Resources is operating an "adult bookstore" in violation of Knoxville City Code section 16-468. The complaint further states that, despite repeated citations and fines, Entertainment Resources continues to operate Fantasy Video in violation of the ordinance, that irreparable harm will result absent enjoinment of such operations and that a

temporary injunction is necessary to preserve *status quo* pending a hearing on the City's request for a permanent injunction.

After hearing was held on the City's complaint on December 8, 1998, the Trial Court announced that:

> The defendant, Entertainment Resources doing business as Fantasy Video will be temporarily enjoined during the pendency of this action from operating an adult bookstore at 6422 Papermill Road, Knoxville, Tennessee. This holding is based on the fact that a substantial and significant portion of the store's stock in trade is comprised of videos which are characterized by their emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas as defined in the ordinance. The injunction is not based on the fact that the store has a segment or section devoted to the sale or display of such material.

Thereafter, on December 21, 1998, the Trial Court entered its order granting the temporary injunction against Entertainment Resources. A subsequent motion by Entertainment Resources seeking interlocutory appeal was denied.

On March 18, 1999, Entertainment Resources filed its answer to the City's complaint, counterclaiming for a declaratory judgment that Knoxville Code section 16-468 is unconstitutional and seeking compensation for damages and attorney fees incurred as a result of its enforcement.

In January of 2001, Entertainment Resources lost its lease on the Papermill Road property and possession was

transferred to the landlord on February 28, 2001. Thereafter, the City filed a motion to voluntarily dismiss its complaint for injunctive relief, which motion was granted on the basis that, upon closure of the store, the case was moot. The Court noted, however, that Entertainment Resources retained the right to seek damages should it turn out that the temporary injunction was wrongfully issued.

On April 15, 2002, the Trial Court entered its memorandum opinion and order adopting findings of fact and conclusions of law proposed by the City and holding that Entertainment Resources was not wrongfully enjoined from operating the video store on Papermill Road and that all other issues involved in the case were moot. The order further provides that the case be dismissed with costs taxed to Entertainment Resources. Following entry of this memorandum and order Entertainment Resources filed its notice of appeal.

The issues submitted for review are restated as follows:

1. Is this case a proper matter for declaratory relief?

2. Are the terms of Knoxville City Code Section 16-468 unconstitutionally vague?

3. Did the temporary injunction against Entertainment Resources violate T.R.C.P. 65.02(1)?

4. Is Entertainment Resources entitled to recovery of damages in this case?

Our standard of review in this non-jury case is *de novo* upon the record of the proceedings below and there is no presumption of correctness with respect to the Trial Court's

conclusions of law. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26 (Tenn. 1996) and T.R.A.P. 13(d). The Trial Court's factual findings are, however, presumed to be correct and we must affirm such findings absent evidence preponderating to the contrary. *Union Carbide Corp. v. Huddleston, 854 S.W.2d 87 (Tenn. 1993).*

The first issue we address is whether this case is a proper matter for declaratory relief.

In its counterclaim filed on March 18, 1999, Entertainment Resources requested declaratory relief regarding the constitutionality of the ordinance in question pursuant to the Tennessee Declaratory Judgments Act as embodied at *T.C.A. 29-14-101, et seq.* The Trial Court held that upon closure of the store this issue, along with all other issues except the issue of the propriety of the temporary injunction and resulting damages, became moot. In accord, the City points out that at the time of trial below, Fantasy Video was no longer located on Papermill Road, there was no proof that Entertainment Resources had attempted to reopen any location within Knoxville, and that Entertainment Resources no longer had a presence in Knoxville. The City recognizes that the parties have stipulated that Entertainment Resources intends to open and operate more than one video store location in Knoxville if and when a judicial determination is made regarding the constitutionality of the ordinance and that Entertainment Resources has the financial means and capability to open a video store in Knoxville. However, the City contends that the *intentions* of Entertainment Resources are insufficient to create a justiciable controversy. In support of its argument the City cites *West v. Carr, 212 Tenn. 367, 370 S.W.2d 469 (Tenn. 1963)* wherein the Tennessee Supreme Court stated as follows:

> [The Declaratory Judgments] Act deals only with present rights that have accrued under presently existing facts. It gives the Court no power to determine future rights or possible controversies in anticipation of events that may not occur. (Citations omitted)

It does not enable courts to give advisory opinions upon what the law would be upon a theoretical or hypothetical state of facts.

The City asserts that Entertainment Resources is requesting a decision based upon a hypothetical set of facts that may never occur and, therefore, declaratory relief should be denied.

It is unnecessary that we decide whether the referenced stipulations of the parties regarding Entertainment Resources' future plans and intentions are sufficient to show a justiciable controversy because of the following additional stipulation:

Hearings on a number of citations issued with respect to the Papermill Road store have been held in Knoxville City Court. The City Court judge found the Ordinance had been violated. The citations are all on appeal to Circuit Court, where they are being held in abeyance with the agreement of the parties pending the outcome of this case.

Elsewhere in its brief the City notes that, as of the date of its November 4, 1998, complaint fines and costs of nearly $ 4,000.00 had been imposed by the Knoxville Municipal Court.

In *Parks v. Alexander*, 608 S.W.2d 881 (Tenn. Ct. App. 1980), we noted that in order for there to be a justiciable

controversy which will warrant a declaratory judgment action "a real question rather than a theoretical one must be presented and a real legally protectable interest must be at stake on the part of the plaintiff." It is our determination that Entertainment Resources has a "real legally protectable interest at stake" in its appeals to the Circuit Court and the issue raised regarding the constitutionality of the ordinance presents "a real question" in that the resolution of such issue will have a decisive effect upon the outcome of those appeals.

It is well settled that the purpose of the Declaratory Judgment Act "is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and is to be liberally construed and administered." *Shelby County Bd. of Com'rs. v. Shelby County Quarterly Court*, 216 Tenn. 470, 392 S.W.2d 935 (Tenn. 1965) citing *Miller v, Miller*, 149 Tenn. 463, 261 S.W. 965 (1923). Under the circumstance presented in the present matter we find that it is appropriate that we entertain the request for declaratory relief.

The next issue we address is whether Knoxville Code Section 16-468 is unconstitutionally vague under the *First Amendment of the United States Constitution* and under *Article I, section 19 of the Tennessee Constitution*.

The First Amendment is applicable to the States through the *Fourteenth Amendment* and provides in pertinent part that "Congress shall make no law ... abridging the freedom of speech or of the press." *Article I, section 19 of the Tennessee Constitution* similarly provides in pertinent part that "the free communication of thoughts and opinions is one of the invaluable rights of man and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty."

The standard applicable in determining whether a statute or ordinance is unconstitutionally vague is whether "it requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 322 (1926).

In *Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) the Supreme Court stated as follows at pages 108-109:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abuts upon sensitive areas of basic *First Amendment* freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' ... than if the boundaries of the forbidden areas were clearly marked.'" (Citations omitted.)

As further noted by the Supreme Court of this state in *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520 (Tenn. 1993) at page 531:

> In the context of *First Amendment* cases, the Supreme Court has imposed a more stringent rule which requires that statutes that impinge on the area of freedom of expression must have a greater degree of specificity than in other contexts, so as to insure that citizens will not be "chilled" from exercising their constitutional right to free expression.

The ordinance in the instant matter governs the location of any business determined to be an "adult bookstore" and defines "adult bookstore" as "an establishment having as a *substantial or significant* portion of its stock and trade books, magazines and other periodicals, videotapes or other electronic media which are distinguished or characterized by their emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas, or an establishment with a segment or section devoted to the sale or display of such material." (Emphasis added.)

Entertainment Resources specifically contends that the phrase "substantial or significant" is vague and that the ordinance does not provide guidance as to its meaning. As a result, Entertainment Resources asserts that it could not determine at what point it would be deemed to be an "adult bookstore" under the ordinance and, therefore, could not determine at what point it could operate without violating the temporary injunction which enjoined it from operating as an "adult bookstore" at the location in question.

Sergeant Rick Ferguson, the officer in charge of the Inspection Division for the Knoxville Police Department, supervised the inspection and citation of Fantasy Video. Sergeant Ferguson testified that he could not define "substantial" other than "substantial means substantial as red means red; I know red when I see it, but I can't describe red." Sergeant Ferguson further testified that "significant to me means a quantity of something that, compared to something else." When asked to define the terms "substantial" and "significant", Officer Phil Major who worked under Sergeant Ferguson's supervision, testified that "substantial is substantial. I don't really have an opinion on the definition of substantial, it is self-explanatory." Officer Major further testified that "significant is just like substantial, I mean, significant is significant, just as substantial is substantial." These officers also stated that in making the evaluation of "substantial" and "significant" they would look to what appeared to them to be the "important part of the business."

This testimony, all of which is stipulated by the parties and all of which was provided by witnesses for the City, shows that the officers who issued the citations against Entertainment Resources for violation of the ordinance are unable to offer an objective definition of the meaning of the terms "substantial" and "significant" and that the definitions they present are nothing more than tautologies.

The City argues that the police officers' testimony is irrelevant to a determination of whether the ordinance is unconstitutionally vague and that such testimony should not be considered by us in that regard. In support of this argument the City cites *Dempsey v. Correct Mfg. Corp.*, 755 S.W.2d 798 (Tenn. Ct. App. 1988) and *Hung v. Otis Elevator Co.*,

Inc., an unpublished opinion of this Court filed in Nashville on October 11, 1995.

In *Dempsey* the plaintiff submitted the affidavit of an electrical engineer wherein the engineer attested that he had read the regulations which were relevant in that case and, based upon such reading, stated his interpretation of the statute with respect to the defendant's duties. This Court stated at page 306:

> The content meaning and application of statutes and regulations are not a matter of fact to be proven by the affidavit of an expert witness, but are a matter of law to be presented by brief and argument of counsel supported by citations and authorities.

In *Hung* the plaintiff offered the affidavit of an engineer in which the engineer set forth his opinion as to the intent of a rule appearing in the Elevator Safety Code with regard to the duties of escalator manufacturers. Citing *Dempsey, supra,* we found that the opinions of the electrical engineer concerning the intent of the legislature and the intent of the rule were inadmissible into evidence.

In the matter before us the officers' testimony does not present their determination as to whether Knoxville City Code section is unconstitutional. Were that the case we would be obliged to disregard such testimony under the authority of *Dempsey* and *Hung*. However, the fact that those charged with enforcement of the ordinance are themselves unable to define crucial terms in a way that would provide adequate guidance to those who might be subject to the ordinance is evidence we can consider in making our independent determination with respect to whether the ordinance is unconstitutionally vague.

In addition to the testimony of the officers referenced above, it is stipulated that Entertainment Resources asked the police conducting the inspections what portion of its stock was permitted to be sexually explicit material without making the business an adult bookstore under the ordinance and was unable to obtain any guidance. It is further stipulated that the City Court judge assigned to hear the citations issued to Entertainment Resources advised that he did not know what percentage of stock of adult videotapes would be allowed under the ordinance.

In *Ellwest Stereo Theater, Inc.*, 718 F. Supp. 1553 (M.D. Tenn. 1989) the Court analyzed an ordinance governing the licensing of adult oriented businesses in Nashville which utilized the language at issue in the present case stating as follows as set forth at page 1581:

> 'Adult Bookstore' means an establishment having as a *substantial or significant* portion of its stock and trade in books, films, video cassettes, or magazines and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas'. . . (Emphasis added.)

The plaintiff in *Ellwest* argued that "the phrase 'substantial or significant' is vague and overbroad and does not put the owner of a bookstore which sells such adult-oriented material on notice of whether it is an 'adult bookstore' as defined by the ordinance." Noting the testimony of a health department official charged with administering the ordinance which showed that he could not quantify the phrase "significant or substantial", this Court found the ordinance in *Ellwest* to be both overbroad and vague stating as follows at page 1581:

> The Court finds it extremely revealing that a representative of the Health Department, the agency charged with administering this ordinance, was unable to determine under the ordinance which establishments it was entitled to regulate. Clearly, if the regulating authority cannot determine the establishments which are subject to its authority, the establishments themselves cannot be expected to determine whether they need to be licensed or not.

Although the City states in its brief "the officers actually had no trouble understanding the Ordinance or enforcing its terms", it is our determination that any such understanding and enforcement must necessarily have been based upon the officers' subjective analysis and not upon an objective standard which would serve to guide a citizen seeking to comply with the ordinance. The fact that the officers issued citations under the ordinance is not evidence that the ordinance is constitutional.

The problem with the use of terms such as "significant" or "substantial" is that they must suffice for application to a wide range of situations across a broad spectrum. While there will most likely be agreement as to those situations falling at either extreme of the spectrum, without more specificity, there will be inevitable disagreement as to those situations near the middle of the spectrum and "men of common intelligence" seeking to apply the ordinance "must necessarily guess at its meaning and differ as to its application. "Accordingly we find that Knoxville City Code section 16-468 is unconstitutionally vague and, therefore, unenforceable.

Although Entertainment Resources raises other issues regarding the constitutionality of the ordinance, in our discretion we decline to address those issues having otherwise

determined, for the reasons stated above, that the ordinance is unconstitutional and unenforceable.

The next issue we address is whether the Trial Court erred in its issuance of the temporary injunction against Entertainment Resources.

T.R.C.P. 65.02(1) provides as follows:

> Every restraining order or injunction shall be specific in terms and shall describe in reasonable detail, and not by reference to the complaint or other document, the act restrained or enjoined.

The order of the Trial Court entered on December 21, 1998, temporarily enjoined Entertainment Resources "from operating an adult bookstore" during the pendency of the case. Given our finding that the ordinance's definition of "adult bookstore" is unconstitutionally vague it necessarily follows that the injunction fails to specify "in reasonable detail . . . the act . . . enjoined." Accordingly, it is our determination that the temporary injunction violates T.R.C.P. 65.02(1).

The final issue we address in this appeal relates to the matter of damages. Entertainment Resources seeks damages under *42 U.S.C. section 1983* for lost profits, out-of pocket expenses and attorney fees. The City asserts that "Entertainment Resources damage claims are too speculative in nature to support a judgment and that the company failed to mitigate its damages after entry of the temporary injunction."

42 U.S.C. section 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other property proceedings for redress . . . .

This Court has, on prior occasion, recognized that the remedial purpose of *42 U.S.C. section 1983* is "to 'ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief.'" *Pendleton v. Mills*, 73 S.W.3d 115 (Tenn. Ct. App. 2001) citing *Burnett v. Grattan*, 468 U.S. 42, 104 S. Ct. 2924, 82 L. Ed. 2d 36 (1984).

In the case before us the parties have specifically stipulated that "Entertainment Resources has lost profits because of the entry of the preliminary injunction in this cause." The law in this state provides that while speculative damages are not recoverable "'mere uncertainty as to the amount will not prevent recovery if the evidence is of such certainty as the nature of the case permits and such as to lay a foundation enabling the triers of the facts to make a fair and reasonable assessment of damages." *Wilson v. Farmers Chemical Association*, 60 Tenn. App. 102, 444 S.W.2d 185 (Tenn. Ct. App. 1969).

In support of its argument that Entertainment Resources damages attributable to lost profits suffered by Fantasy Video are too speculative for recovery the City references testimony

of a certified public accountant hired by Entertainment Resources to the effect that one year was a normal operating cycle to predict the finances of a business and the City asserts that Fantasy Video was only open for four months before the temporary injunction was entered. The City also notes that the same witness testified that the businesses used for comparison were not located in the Knoxville geographic market. We disagree that this testimony warrants the conclusion that damages in this case are too speculative to support a judgment and it is our finding that a trier of fact might reasonably assess damages for lost profits based upon the performance of similar businesses taking into account relevant variables.

Entertainment Resources requests that we instruct the Trial Court to award it damages for lost profits for a second and third store it "had formulated a business plan to open." While we do not find that lost profit damages are too speculative with regard to the store at Papermill Road, which was open and operating, we do find that such damages are too speculative with regard to the non-existent second and third stores that were merely planned. Accordingly, this request of Entertainment Resources is denied.

As to the City's argument that Entertainment Resources failed to mitigate its damages it is our determination that it is appropriate that such argument be addressed by the Trial Court upon remand.

The parties appear to be in agreement that the propriety of awarding attorney fees in this case is also a matter that is properly addressed by the Trial Court upon remand.

Based upon the foregoing we reverse the judgment of the Trial Court and declare Knoxville Code section 16-468 unconstitutional and unenforceable and remand the cause as

to the matter of damages. Costs of appeal are adjudged against the City of Knoxville.

/s/_____
HOUSTON M. GODDARD,
PRESIDING JUDGE

APPENDIX C

IN THE CHANCERY COURT
FOR KNOX COUNTY, TENNESSEE

No. 140736-2

[Filed April 15, 20002]

CITY OF KNOXVILLE,	)
Plaintiff,	)
	)
v.	)
	)
ENTERTAINMENT RESOURCES, LLC	)
D/b/a FANTASY VIDEOS,	)
Defendants.	)
	)

MEMORANDUM OPINION AND ORDER

The City of Knoxville brought this action seeking to permanently enjoin the defendant's operation of a video rental store at 6422 Papermill Road, Knoxville, Tennessee. The City contended that defendant's business was in violation of Knoxville Code §16-468.

A temporary injunction was issued enjoining the operation of the adult bookstore at that location as it was defined in the ordinance. However, the Court specifically held that the injunction was not based on the fact that the store had a

segment, or section, of its stock devoted to the sale, or display, of the adult material. Nothing in the temporary injunction prohibited defendant from continuing to rent the admitted adult videos at that location.

Instead of attempting to comply with the temporary injunction, the defendant instead elected to discontinue renting any of the so-called adult videos held for rental in the "back room". The only videos thereafter offered for rental were those un-catalogued general purpose videos defendant held for rental in the so-called "front room". The Court finds that defendant never intended to hold these so-called "front room" videos for rental but accumulated those solely for the purposes of accumulating general release videos in an effort to avoid the zoning ordinance.

As expected, no "front room" videos were rented and the store ultimately closed. Upon closure of the store, this Court held that the case was moot except for defendant's claimed damages for wrongful injunction. That claim is currently before the Court.

Defendant argued that the ordinance is a prohibited attempt on the part of the City to regulate the content of defendant's merchandise. City contends the ordinance was an effort to combat the secondary affects of such an establishment and that the ordinance was patterned after the Detroit ordinance considered by the United States Supreme Court in *Young v. American Mini Theatres, Inc.*, 427 US 50, 49 L.Ed.2d 310, 96 S. Ct. 2440 (1976). The City argues the ordinance is one that should be considered as a content neutral ordinance and that it is an acceptable time, place and manner regulation.

Defendant further argued that even if the ordinance satisfies the content neutral test, then it is still unconstitutionally vague, in that certain terms are overly broad and incapable of being understood.

As to the first issue, the appropriate inquiry is to whether the ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 89 L.ED.2d 29. 106 S. Ct. 925 (1985), citations omitted.

The parties have been directed to submit proposed findings of fact and conclusions of law. The Court finds plaintiff's proposed findings and conclusions to be correct and adopts those except as modified or supplemented herein. Accordingly, as to the first issue it is clear that the ordinance meets the *Renton* standard.

As to the second issue, this Court has found that defendant was in direct violation of the ordinance. Defendant knew this when it acquired the premises at 6422 Papermill Road, Knoxville, Tennessee and immediately filed suit in the U. S. District Court for the Eastern District of Tennessee to challenge the constitutionality of the ordinance.

Even if there may be some uncertainty about some of the terms in the ordinance, that uncertainty has no affect on this particular defendant. *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435 (6th Cir. 1998).

Therefore, the Court holds that defendant was not wrongfully enjoined and that all other issues involved in this case are moot. The case is dismissed with the costs taxed to the defendant, for which execution may issue, if necessary.

Filed and entered this 15th day of April, 2002.

/s/ _____
Chancellor

APPENDIX D

IN THE CHANCERY COURT
FOR KNOX COUNTY, TENNESSEE

No. 140736-2

[Filed November 30, 2001]

CITY OF KNOXVILLE,	)
Plaintiff,	)
	)
v.	)
	)
ENTERTAINMENT RESOURCES, LLC	)
D/b/a FANTASY VIDEOS,	)
Defendants.	)
	)

(Chancellor Fansler)

CITY'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

The Court adopts the Factual Stipulations of the Parties.

CONCLUSIONS OF LAW

1. The Court finds that the subject ordinance is not vague, particularly with reference to the defendants. "The standard normally used in determining if a statute is vague is whether 'men of common intelligence must necessarily guess at its meaning.'" *Broadrick v. Oklahoma*, 413 U.S. 601, 607, 93 S.Ct. 2908, 2913, 37 L.Ed.2d 830 (1973). In *Grayned v. City of Rockwood*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972), an opinion by Justice Marshall, the U.S. Supreme Court upheld an ordinance on vagueness issues that (1) "for(bade) deliberately noisy or diversionary activity" that disrupted normal school activities, (2) forbade willful activity at fixed times, and (3) forbade such activity at a sufficiently fixed place ("adjacent" to the school). Notably, the Court recognized the fact that Entertainment Resources seems to ignore – that "[a]s always, enforcement requires the exercise of some degree of police judgment." *Id.* at 114. But, as that Court noted, some degree of judgment is permissible. The key is that the ordinance "contain[s] no broad invitation to subjective or discriminatory enforcement" but "'defines boundaries sufficiently distinct' for citizens, policemen, juries, and appellate judges." *Id.* Finally, in words that are particularly appropriate in any vagueness analysis, Justice Marshall wrote:

> Condemned to the use of words, we can never expect mathematical certainty from our language. The words of the Rockford ordinance are marked by 'flexibility and reasonable breadth, rather than meticulous specificity,' (citations omitted) but we think it is clear what the ordinance as a whole prohibits.

Id., quoting Esteban v. Central Missouri State College, 415 F.2d. 1077, 1088 (8th Cir. 1969) cert. denied, 398 U.S.

965 (1970). The ordinance sets reasonably clear guidelines for law enforcement to prevent arbitrary and discriminatory enforcement. *See Smith v. Goguen*, 415 U.S. 566, 572-73, 94 S.Ct. 1242, 1247-48 (1974); *Grayned*, 308 U.S. at 108; *Baby Tam & Co., Inc. v. City of Las Vegas*, 247 F.3d 1003, 1008 (9th Cir. 2001

This ordinance is not so unclear that virtually no standard exists at all. *See, e.g., Smith v. Goguen*, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974) (statute providing criminal penalty for treating U.S. flag "contemptuously" held unconstitutionally vague since it fails to "draw reasonably clear lines between the kinds of nonceremonial treatment that are criminal and those that are not"); *Coates v. Cincinnati*, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971)(city ordinance declared to be unconstitutionally vague which prohibited three or more persons from assembling in public and "conduct[ing] themselves in a manner *annoying* to persons passing by"). In these and other cases, the statute or ordinance is constitutionally infirm, "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that *no standard for conduct is specified at all.*" *Id.* at 217 (Emphasis added). The *Grayned* decision and analysis is of particular significance in Tennessee because our state Supreme Court chose to adopt the standard set forth in *Grayned* in *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 531-32 (Tenn. 1993)

The Council of the City of Knoxville has provided a comprehensible standard by which any ordinary person will understand what is proscribed. The Ordinance prohibits the location of an adult bookstore within a specific number of feet from various uses and zoning. Entertainment Resources cannot reasonably argue that it does not know what an adult

bookstore is—it clearly knew what videos to put in the back room with an age restriction for entry, and it certainly knew its reason for existence when it argued that it could not stay in business and would suffer great damages if the "adult bookstore" portion or back room was enjoined from operation. Although the business did alter stock ratios, this Court has found and no proof has disputed that these stock alterations were a sham attempt to avoid classification as an adult bookstore.

The specific terms of the ordinance are not unconstitutionally vague. The terms "substantial" and "significant" often appear in the U.S. Code, as the Eastern District Court of Michigan pointed out in *15192 Thirteen Mile Rd., Inc. v. Warren*, 626 F.Supp 803 (E.D. Mich. 1985). The court also noted that the phrase "substantial or significant" is not unconstitutionally distinguished by an emphasis on specified sexual activities or vague, nor is "characterized or specified anatomical areas." The same "substantial or significant" phrase was upheld in *Chicago v. Scandia Books, Inc.*, 430 N.E.2d 14, (1st D. Ill. 1981).

When such terms are not specifically defined in a statute or ordinance, one assumes that they retain their ordinary and customary meanings. The *DK Illustrated Oxford Dictionary*, Oxford University Press, Inc., 198 Madison Avenue, New York, NY 10016, © 1998, defines "substantial," in part, as 1)a) of real importance or validity; b) of large size or account; and 3) commercially successful. "Significant" is defined, in part, as "noteworthy; important."

As the Sixth Circuit has noted, "most buyers, sellers and judges know what such materials are and who are adults and who are children." *Richland Book Mart, Inc. v. Nichols* 137 F. 3d 435 (6th Cir. 1998) at p. 440. Any inability to articulate

a definite standard by police officers or lawyers is irrelevant to this analysis. It is well-settled under Tennessee precedent that the interpretation of statutes and ordinances presents a question of law for the court, not a factual determination stemming from witness testimony. *State v. Jackson*, 16 S.W.3d 797, 800 (Tenn. Ct. App. 1999); *Dempsey v. Correct Mfg. Corp.*, 775 S.W.2d 798, 806-807 (Tenn. Ct. App. 1988); *Hung v. Otis Elevator Co., Inc.*, No. 01A01-9504-CV-00719, 1995 WL 595646 (Tenn. Ct. App. Oct. 11, 1995). *See also Beare Co. v. Tennessee Dep't of Revenue*, 858 S.W.2d 906, 907 (Tenn. 1993); *Moto-Pep v. McGoldrick*, 303 S.W.2d 326, 330 (Tenn. 1957).

2. The Court finds that it would not be proper to grant declaratory judgment to Entertainment Resources as an advisory opinion under the current circumstances. Entertainment Resources asks this Court to set a percentage value to define what is a "significant" or substantial" portion of its "stock" and "trade." "Limiting the definition to establishments that meet a specific sales percentage would frustrate the (ordinance's) purpose by drawing arbitrary classifications." *Golden Triangle News, Inc.*, v. *Corbett* 689 A.2d 947 (PA Commons Ct 1997) at p. 985. 'The ordinance does not require any specific percentage, it merely requires that a substantial and significant portion of the store's stock (and) trade consists of sexually-oriented material," *State v. Holmberg* 545 N.W. 2d 65 (Minn Ct. App. 1996) at p. 72. It would not be appropriate to assign a percentage of value to define substantial or significant.

The stock of adult material is substantial if they would not be able to stay in business without that portion. It is not a quantitative amount but rather a qualitative evaluation of the purpose of the business that determines if the adult material is a "significant" or "substantial" portion of its "stock and

trade." Is the adult material an "important" or "noteworthy" portion of the business' stock and trade? This determination can be made in the judgment of the officer and court by examination or observation of the business. As noted, the dictionary gives guidance regarding these definitions.

There has been no issue raised by Entertainment Resources that the trade of the business was not adult material as defined by the ordinances of the City. It was, in fact, Fantasy Video's reason for existence.

It is well settled Tennessee law that declaratory judgments should not be used by the Courts to render advisory opinions on what the law would be based upon a hypothetical states of facts. *Third National Bank v. Carver*, 218 S.W.2d 66 (Tenn. App. 1948); *West v. Carr*, 370 S.W.2d 469 (Tenn. 1963) *(Appeal Dismissed)* 378 U.S. 557, 84 S. Ct. 1908, 12 LEd 2d 1034 (1964). Declaratory relief should not be provided with respect to abstract questions. *United States Fid. & Guar. Co. v. Askew*, 191 S.W.2d 533 (Tenn. 1946). (Emphasis Added). Moreover, Fantasy Video may not ask this Court to "make a declaration with regard to a claim which complainant merely fears the defendant may assert in the future." *Carver*, 218 S.W.2d at 8. The hypothetical questions posed by the requests for declaratory relief in Fantasy Video's Counter-Complaint are not justiciable under the Tennessee Declaratory Judgments Act. *Parks v. Alexander*, 608 S.W.2d 881 (Tenn. App. 1980). It no longer has any present rights affected by the ordinance.

3. The Court finds that the ordinance is designed to address the secondary effects of protected speech. Case law is clear that the standard of review for legislation that infringes on First Amendment rights is one of strict scrutiny *unless* that ordinance is designed to address the secondary effects of protected speech. It is established that legislation

designed to address the negative secondary effects of protected speech, which is a legitimate exercise of governmental control, while not content-neutral, shall be evaluated and treated as though it is content neutral. *See U.S. v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *Young v American Mini Theatres, Inc.*, 427 US 50, 96 S. Ct. 2440 (1996) rehearing denied 97 S. Ct. 191. The *Renton* court did not state that these regulations *are* content-neutral, but it made it clear that they are to be treated *as if* they are content-neutral.

As the Seventh Circuit has noted in reference to adult entertainment materials, "because these materials border on the obscene, they are entitled to less First Amendment protection than non-sexually explicit materials." *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 827, (7th Cir. 1999) (citing *Young*, *Id.* at 70-71).

4. The Court further finds that express legislative intent is not necessary to apply the secondary effects analysis. It is not necessary for a legislative body to specifically articulate on the record its concerns about the negative secondary effects of adult-oriented businesses for such enactment to be valid time, place and manner restraint of the location of such businesses. In *Triplett Grille, Inc. v. City of Akron* 40 F. 3d 129 (6th Cir. 1994) the Sixth Circuit Court of Appeals held that the affirmative evidence of a motivation to combat the secondary effects of adult entertainment establishments is not required. In *East Brooks Books, Inc. v. City of Memphis* 48 F. 3d 220 (6th Cir. 1995), the same court indicated that in almost all cases, such content-neutral regulation will be found to be within the power of the promulgating government to further a substantial governmental interest unrelated to the suppression of free speech. As the court noted, [c]ommunities

have a legitimate and substantial interest in controlling the secondary effects associated with sexually oriented businesses, and such regulation is within the constitutional powers of government." *Id.* at 226, citing *Renton* and *Young*.

As the United States Supreme Court has noted:

> (m)oreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for Constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. Thus, the absence of 'legislative facts' explaining the distinction '[o]n the record' has no significance in rational-basis analysis. *FCC v. Beach Communications. Inc.* 1135, Ct. 2096 (1993) at 2102 (citing *United States Railroad Retirement Bd v. Fritz* 101 S. Ct. 453(1980)).

In *U.S. v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672(1968), the U. S. Supreme Court has also noted that "[i]nquiries into congressional motives or purposes are a hazardous matter." *Id.*, at 383,1682. The court went on to say that:

> [w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it.

Id. at 384, 1683.

Further, in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 296-97, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000), the Supreme Court noted that the activity of the subject ordinance (public nudity) in that case was of the same character as the adult entertainment at issue in *Renton* and *Young v. American Mini Theatres, Inc.* 427 US 50, 96 S. Ct. 2440 (1996) rehearing denied 97 S. Ct. 191. The court found that the city could "reasonably rely on the evidentiary foundation set forth in *Renton* and *American Mini Theatres* [i.e. *Young*] to the effect that secondary effects are caused by the presence of even one adult entertainment establisltment in a given neighborhood." *Erie v. Pap's, Id.* at 297.

The Third Circuit has also addressed this issue in *Phillips v. Borough of Keyport*, 107 F.2d 164, 178 (3rd Cir. 1997):

> There is a significant difference between the requirement that there be a factual basis for a legislative judgment presented in court when that judgment is challenged and a requirement that such a factual basis have been submitted to the legislative body prior to the enactment of the legislative measure. We have always required the former; we have never required the latter. Whatever level of scrutiny we have applied in a given case, we have always found it acceptable for individual legislators to base their judgments on their own study of the subject matters of the legislation, their communications with constituents, and their own life experience and common sense so long as they come forward with the required showing in the courtroom once a challenge is raised. In reliance on this approach, most municipal and county councils throughout the land and some state legislatures do not hold hearings and compile legislative records before acting on proposed

> legislative measures. We perceive no justification in policy or doctrine for abandoning our traditional approach. Moreover, we believe that insistence on the creation of a legislative record is an unwarranted intrusion into the internal affairs of the legislative branch of government.

The court went on to note that:

> If a legislative body can produce in court whatever justification is required of it under the applicable constitutional doctrine, we perceive little to be gained by incurring the expense, effort, and delay involved in requiring it to reenact the legislative measure after parading its evidence through its legislative chamber.... While we agree with appellants that the creation of a legislative record can have probative value on what the lawmakers had in mind when they acted, we do not understand why its absence should be controlling when the court is otherwise satisfied that the legislative measure has a content-neutral target.

Id.

The Tennessee Supreme Court has also noted that it is "of the opinion it is unnecessary (that) the legislature spell out in the body of a particular Act its reasons for adopting one particular policy or another." *Estrin v. Moss* 430 S.W. 2d 345 (Tenn. 1968) at p. 350. There is no requirement that the basis for passage of the legislation be spelled out so long as the City can show that the ordinance is reasonably related to the curtailment of such negative effects; neither is there any requirement that the City show that it has suffered these effects before it enacts legislation designed to prevent them.

The Court would also note that within three (3) years of the U.S. Supreme Court decision in *Young v. American Mini Theatres, Inc.* 427 US 50, 96 S. Ct. 2440 (1996) rehearing denied 97 S. Ct. 191, the City of Knoxville passed an ordinance that is virtually identical to that addressed in *Young*. The *Young* court specifically mentioned that a municipality's interest in the character of its neighborhoods and its "interest in attempting to preserve the quality of urban life is one that must be accorded high respect." (*Id.* at p 71) It is beyond the realm of reason to believe that the City of Knoxville would have written a virtually identical ordinance with no knowledge of the ordinance presented to the *Young* court and without knowledge of the basis for that ordinance.

It is clear from the case law in this area and from the secondary effects studies cited by the City and filed in this record, that adult entertainment establishments, create negative secondary effects. As the Seventh Circuit pointed out in *DiMa* "[i]t would indeed be an exercise in futility if we struck down the ordinance becauseof the improper motives of some Board members, and the Board was then able to immediately reenact the same ordinance but with the members all being careful to avoid stating their illegitimate motives." *DiMa, Id.* at 829. The court went on to cite *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) in discussing that:

> Justice Sourer accepted the state's justification and its' evidence which it proffered during the litigation, although there was no evidence that the state had been motivated by combating secondary effects when it enacted the statute or that it had had any of the evidence before it. (at 582-83, 111 S.Ct. 2456) Moreover, Justice Souter accepted the experiences of other cities as *reported in judicial opinions* as being

> evidence upon which the legislature could have reasonably relied. (emphasis supplied) *Id.* at 830.

The court also points out that "[t]he actual motives of those who enacted the ordinance are irrelevant to our First Amendment analysis." *Id.* at 828.

The Court also notes the terms of the ordinance itself regarding its intent to address negative secondary effects. All of the businesses regulated by the subject ordinance are adult entertainment establishments. The ordinance requires that these establishments be spaced a certain number of feet from particular uses, such as residential zones, schools, churches, hospitals, mortuaries, etc. The purpose of spacing would appear to be to ensure that the negative secondary effects do not affect these locations. The materials, presentations, or subject matter within the adult entertainment building would not affect surrounding areas. It is detrimental to the quality of urban life for people such as children or mourners to be exposed to individuals masturbating or exposing their genitals, prostitution, sexual harassment, or any of the other negative secondary effects noted in the studies, by the courts, and by communities. If the effects of these establishments were confined to their four walls, the analysis would be much different, and spacing requirements would not be necessary. Unfortunately, the effects go outside the building and, therefore, the City must exercise some controls. The court in *15192 Thirteen Mile Road* looked at the language of an ordinance itself in evaluating this issue and also noted that the absence of a reason given for the ordinance at the time of passage was not a problem if the city could show a reason to the court, such as addressing secondary effects.

5. The Court finds that Entertainment Resources' argument that the case law cited regarding the secondary

effects analysis does not apply to Fantasy Video as no "on-site viewing" occurred there has no merit. The photographic exhibits previously introduced to this Court show that a great many still photographic images were viewed by any customer that entered the back room of Fantasy Video. In fact, the record shows that 3500 - 4000 videotapes covers were on display in the back room. These photographic images include multiple photographs of men orally manipulating the penis of other men; women orally manipulating a penis; a penis ejaculating on a woman's face; penile penetration of a man's anus, some set in a restroom; penile penetration of a woman's anus; the spread-eagle display of a woman's pubic region with a male with an erect penis immediately above said region; the female oral manipulation of another female's pubic region; and photos of groups of people doing some combination of the above to one another, with descriptive titles, such as "Bathroom Buddies;" "Girls Who Love Big White Cocks, vol. 5;" "On the Job Banging (Sex at Work);" "Group Gropes;" "Cumback Pussy;" and "The Blowjob Adventures of Dr. Fellatio." Each of the 3500 to 4000 videos displayed some erotic or graphic sexual image. The viewing of these visual images, whether they are still or moving, is exactly the activity which gives rise to the concerns regarding the secondary effects of such businesses, as discussed above. The difference in the mode of delivery is constitutionally insignificant. *Z.J- Gifts D-2, L.L.C.v. City of Aurora*, 136 F.3d 683 (10th Cir. 1998). *See also ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413,1414 (8th Cir. 1994).

6. The Court finds that there are sufficient alternate avenues of communication for adult businesses within the City of Knoxville. The City identified 304 lots comprising approximately 5% of the acreage within the City limits where an adult-oriented business may locate.

The City identified 62,664.35 acres as the size of the City of Knoxville as of March 30, 2000. The land deducted for rivers or lakes and public rights-of-way comprised 14,046.72 acres, leaving 48,617.63 acres as the total Knoxville parcel land. The sites identified using the City's criteria consisted of 2,653.36 acres or 5.5% of the City's available parcel land. Of those sites, 33.4% were zoned for commercial use. The commercially zoned acreage of the City is 7624.2 acres. Of the City's identified sites, 905.35 acres were commercially zoned, making approximately 11.9% of the City's commercially zoned real estate available under the City's criteria. Commercial zoning comprised 12.17% of the City's available parcel land.

Of the City's 6081.7 acres of industrially zoned property, 968.9 acres, or 15.9%, were deemed eligible under the City's criteria. In combination, 69% of the 304 sites identified by the City are zoned either commercially or industrially. This is 13.7% of the total commercial and industrial zoning in the City. As noted in Stipulated Exhibit 19, several of the commercially zoned parcels were available for lease or sale.

Under Entertainment Resources analysis, only 23.01 acres, or .0473% of the City's parcel land is available. The Court does not find that analysis to be applicable.

Under the City's criteria for application of the ordinance, there are 311 sites, or one for every 559 people, available for adult businesses. These different analyses, plus others, have all been utilized by different courts, as noted by the City. Under any of these evaluations, this Court finds that there are certainly ample alternate avenues of communication. *See International Eateries of America, Inc. v. Broward Co. FL*, 941 F.2d 1157 (11th Cir. 1991); *International Food & Beverage Sys. v. City of Ft. Lauderdale*, 794 F.2d 1520 (11th

Cir. 1986); *Boss Capital Inc. v. City of Casselberry*, 187 F.3d 1251, 1254 (11th Cir. 1999).

7. The Court does not find that industrially zoned areas of the City should be excluded. Zoning and zoning regulations are subject to change, but more persuasively, the U.S. Supreme Court in *Renton v. Playtime Theatres, Inc., et al.* 475 U.S. 41, 106 S. Ct. 925 (1986) specifically included "acreage in all stages of development from raw land to developed, *industrial*, warehouse, office and shopping space that is crisscrossed by freeways, highways, and roads." *Id.* at 41 (emphasis added). Apparently, the *Renton* court even included the type of right-of-way land excluded by the City's analysis. Part of the land considered in the land available as an alternate avenue of communication in *Renton* included an oil tank farm (similar to that at the Middlebrook Pike area), a horse racing track and a sewage treatment facility. *Topanga Press. In'. v. City of Los Angeles*, 989 F. 2d 1524 (9th Cir. 1993). *See also D.G. Restaurant Corp. v. City of Myrtle Beach*, 953 F.2d 140, 147 (4th Cir. 1991); *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, 1254 (11th Cir. 1999); *D.H.L Associates, Inc. v. O'Gorman*, 199 F.3d 50, 60 (1st Cir. 1999); *Lakeland Lounge v. City of Jackson, Mississippi*, 973 F.2d 1255, 1260 (5th Cir. 1992); *North Ave. Novelties, Inc. v. City of Chicago*, 88 F.3d 441, 445 (7th Cir 1996 ("acreage, standing alone, is largely irrelevant." That court further noted that "[r]easonable alternative avenues for communication have been found to exist when six adult businesses were operating in a town and more than six sites existed in the zoned area." *Id.* (referring to *Lakeland Lounge*, at 1260 ("as a matter of arithmetic, ... there are more 'reasonable' site available than businesses with demands for them....")).

8. The Court finds that the criteria used by the City are not vague and are appropriate. The City has stated on the record its criteria for evaluating certain uses and some utilize a permissible degree or judgment by the law enforcement officer.

9. The Court finds that locations with beer permits are not utilized for spacing. The ordinance applies to "alcohol," which is distinct from beer under the city and state's regulatory scheme.

10. The Court finds that the presence of a house or permissive residential use of property within zoning does not create a "residentially zoned area." Zoning for which the primary purpose is residential (designated as "R" zoning in the City) is the zoning to be used for this spacing criteria.

11. The Court finds that the presence of other zoning or zoning outside the city limits is irrelevant to the analysis. The City cannot govern nor regulate nor consider zoning or uses outside its jurisdiction, just as one county would not consider uses in an adjoining county.

12. The ordinance is not violative of the Tennessee Constitution, Article 1, § 19. The Tennessee Supreme Court has been clear that the analysis utilized is the same as that of the federal constitution. (*See Leech v. American Booksellers Assn. Inc.*, 582 S.W.2d 738, 745 (Tenn. 1979)); *Taylor v. State ex. rel Kirkpatrick* 529 S.W.2d 692, 696 (Tenn. 1975); *City of Chattanooga v. McCoy*) 645 S.W.2d 400, 403 (Tenn. 1983); *See also State v. Hunt*, 660 S.W.2d 513, 517 (Crim. App. 1983).

13. The Court finds that Entertainment Resources is not entitled to any damages or expenses related to the injunction.

14. The Court finds that Entertainment Resources offered no competent proof of actual damages aside from the stipulated expenses of the store prior to June 1, 2000. The remainder of the proof offered is inadmissible as too speculative in nature. Proof previously introduced to this court has shown that after the entry of the temporary injunction, Fantasy Video dramatically reduced its hours of opening, limiting itself to being open one or two hours occasionally. The lack of set business hours, computer, cash register, telephone, and general interest stock, in fact, the *removal* of all but a handful of general interest stock was a major contributing factor to any losses that Fantasy Video may have experienced. It apparently chose to limit itself to selling two tapes per week to its own employee, then reimbursing that employee for the purchase. It does not appear that any attempt to operate the general interest video store or to mitigate any damages was made. Entertainment Resources cannot now prove any damages.

Respectfully submitted this 30th day of November, 2001.

CITY OF KNOXVILLE

/s/ _____

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APPENDIX E

IN THE CHANCERY COURT
FOR KNOX COUNTY, TENNESSEE

No. 140736-2

CITY OF KNOXVILLE,	)
Plaintiff,	)
	)
v.	)
	)
ENTERTAINMENT RESOURCES, LLC	)
D/b/a FANTASY VIDEOS,	)
Defendants.	)
	)

STIPULATION OF FACTS

The parties entered into the following factual stipulations:

1. Entertainment Resources opened a store at 5422 Papermill Road in Knoxville, Tennessee on August 3, 1998, offering movies on videotape for rental or purchase for home viewing. No viewing of videotapes by the public was allowed on the premises.

2. Officers of the Knoxville Police Department inspected the Entertainment Resources store at Papermill Road almost every day from the date it opened until the date of the issuance of the preliminary injunction in this cause. On each

occasion, the police issued citations charging violations of Knoxville Code sec. 16-468 ("the Ordinance").

3. The Papermill Road store had a "back room" stocked with sexually explicit "X-rated" videos. The front room was stocked with a mix of videotapes rated G, PG-13, and R and unrated videotapes.

4. Sergeant Ferguson of the Knoxville Police Department was in charge of the Inspection Division and supervised the inspection and citation of the Papermill Road store. Sergeant Ferguson was of the opinion and testified in City Court that he believed there were videotapes in the front room that in his opinion were adult materials "distinguished or characterized by their emphasis on matters depicting, describing or related to specified sexual activity or specified anatomical areas." He specifically named a videotape titled "Frankie and Johnnie." He viewed parts of that video and it contained in part depiction of a sexual relationship between two men.

5. Sergeant Ferguson, Officer Phil Major of the Knoxville Police Department who worked under his direction, and the other officers who participated in inspections of the Papermill Road store received no training or guidance regarding the definitions of the terms that appear in the Ordinance. The officers do receive generalized training in the enforcement of City Ordinances.

6. The City promulgated no standards or guidelines for officers to use in exercising their authority to issue citations pursuant to the Ordinance. The City Law Department was available to respond to questions if officers sought advice.

7. The number of videotapes in the front room and in the back room were counted on a number of dates. Within the ten

days preceding the November 16, 1998 City Court citation hearing, the Police counted 4,443 videos in the back room. The police did not count the videos in the front room on that occasion. Subsequent counts showed that the stock consisted of the following numbers of videotapes on the dates set forth below:

Date	# of front room videos	# of back room videos
11/17/98	5,653	4,224
12/8/98	8,000	3,500

8. As of November 16, at least 75% of the Papermill Road store's revenues were generated by the sexually-explicit "back-room" videos.

9. The front room videos were purchased as bulk inventory from other video stores. No new release videos were in the front room.

10. There were videotapes offered for rental in the back that were displayed with box covers that depicted men orally manipulating the penis of other men, women orally manipulating a penis, penile penetration of a man's anus, penile penetration of a female anus, display of a woman's pubic region with a male with an erect penis immediately above said region, female oral manipulation of another female's pubic region, with descriptive titles. The video box covers are used for merchandising display. They are not rented out. If called to testify, Mr. Bohannon and the store manager, Lee Howard, would testify that when citations were issued, Entertainment Resources was told that it was the number of videotapes that had sexually explicit content that was of concern. They would further testify that if

Entertainment Resources had been told that display of box covers caused it to be subject to the spacing requirements of the Ordinance, it would have covered up graphic material on the box covers to make sure it was not seen on the premises. A portion of the front room videos were displayed with box cover photographs. Others were displayed with the box spine out. Mr. Bohannon would testify that certain series, such as Star Trek or the X Files, would normally be merchandised with one or two box covers showing and the other episodes shelved spine out.

11. Hearings on a number of citations issued with respect to the Papermill Road store have been held in Knoxville City Court. The City Court judge found that the Ordinance had been violated. The citations are all on appeal to the Circuit Court, where they are being held in abeyance with the agreement of the parties pending the outcome of this case. Some of the early citations were simply paid by Entertainment Resources with no hearing held.

12. Sergeant Ferguson testified at the City Court citation hearing on November 16, 1998, that he could not define "substantial" other than "substantial means substantial as red means red; I know red when I see it, but I can't describe red." He further testified that "significant to me means a quantity of something that, compared to something else."

13. Officer Major testified at the City Court citation hearing on November 16, 1998 when asked to define the terms "substantial" and "significant" in the context of the Ordinance that "substantial is substantial. I don't really have an opinion on the definition of substantial, it is self-explanatory," and that "significant is just like substantial, I mean, significant is significant, just as substantial is substantial."

14. The officers if called to testify today would testify that in making the evaluation of "substantial" and "significant" they would look to what appeared to them to be the "important part of the business."

15. At the time the citations referenced above were issued and at the time the Court entered a temporary injunction enjoining Entertainment Resources "from operating an adult bookstore at 6422 Papermill Road," Entertainment Resources' video store was located within 1,000 feet, by direct line of sight, of a residentially zoned district, however, I-40 passed between the Store and the residential zone. To lawfully get from the store to a residentially zoned area you had to travel well over 1,000 feet on City streets. The store was located within 1,000 feet of two establishments licensed to sell beer by the City Beer Board. One of those establishments also had a liquor license. It was also within 1,000 feet of a Boy Scouts office located at 6440 Papermill Road where uniforms could be purchased and meeting occasionally took place. Donald Richard Emmett, an employee with the City Engineering Department, testified that probably the Boy Scout office was in his opinion "an area of amusement which caters to family entertainment" or "an area which is devoted in part or exclusively to recreational activity."

16. According to Mr. Emmett, who gave deposition testimony as a City representative pursuant to Tenn. R. Civ. P. 30.02(6), the Ordinance makes no distinction between areas zoned residential by the City and areas zoned residential by the County, Mr. Emmett testified that when he supervised the survey he was asked to do by the City to locate areas outside the 1,000 foot buffer, he made no distinction between areas zoned residential by the City and areas zoned residential by the County. Mr. Emmett also testified that he interpreted the term "alcoholic beverages" to include beer. He testified

that he could not say what the term "other regulated use" included. He could not define the term "devoted in part or exclusively to recreational activity."

17. Mr. Emmett testified at the December 8, 1998 temporary injunction hearing that the City had conducted an analysis and determined that there were several dozen parcels and hundreds of acres of property in the City where an adult business could be located.

18. Donna Seigumund, who with the assistance of employees of KGIS, performed the analysis about which Mr. Emmett testified, admitted with respect to that analysis that "it was just a first trial run, I mean we knew we weren't eliminating everything." Ms. Seigmund further indicated the analysis was undertaken to identify all locations within the City of Knoxville that complied with the Ordinance's spacing requirements and that the analysis might have identified properties as being potentially available for location of an adult business that might conflict with the Ordinance's spacing requirements.

19. Blockbuster Video stores located in the City of Knoxville stock for rent or sale a large number of videotapes that are rated "R" videotapes rated "NC-17" and videotapes that are "not rated" that are "distinguished or characterized by their emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas." No percentage comparison has been made between this portion of the stock of any Blockbuster store and the total stock of the store.

20. There are a number of Gemstone Video stores located in Knoxville. They all have separate back rooms in which "X-rated" sexually explicit videos are displayed and offered for

rent or sale. The Gemstone Video Store located at 4499 Kingston Pike in the Western Plaza Shopping Center has a back room that contains approximately 1,000 such videos with sexually graphic box cover displays and a display rack containing Playboy, Penthouse, Club and other similar magazines. In addition, the front room of that Gemstone Video contains a section labeled "Mature" that consists of unrated and "R" rated videos, most of which are videos produced by Playboy & Penthouse Magazines, a series titled "Erotic Zones" and other similar videos that are distinguished or characterized by their emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas. In addition, the "Suspense," "Drama," "Action," and "Foreign" sections, each of contain numerous films that are distinguished or characterized by their emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas. There is no count of the front room stock.

21. Both Gemstone and Blockbuster have new releases in their front room stock. There is no count of new releases compared to general library stock of the front room.

22. The Blockbuster Video Stores located in Knoxville do not meet the definition of "adult bookstores" as that term is defined in the Ordinance.

23. The City of Knoxville takes the position that Gemstone Video Stores are not "adult bookstores" within the meaning of the Ordinance, even though they have a separate backroom devoted to videotapes and magazines distinguished or characterized by their emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas. The City takes the position that the "back

room stock" is not a substantial or significant portion of Gemstone's stock and trade.

24. Thee are currently 7 businesses operating with the city limits of Knoxville that the City considers to be "adult businesses" within the meaning of the ordinance. All but 2 of those businesses offer live entertainment on premises. One of the remaining 2 is 100% adult. The other one is principally a video rental and sales store, and while it has both a back room with sexually explicit videos and a front room with general release videos, only a very small percentage of the establishment's stock is general release videos. All of these businesses were in existence either prior to the enactment of the ordinance or of the amended ordinance or were established outside the city limits but are now within the City of Knoxville as the result of annexation. As a result, all of those businesses are "grandfathered" for that use. At least six of the seven businesses would not meet the spacing guidelines for the ordinance. No new business that the city considers to be an adult business has been established since the enactment of the ordinance or the amendment thereto, aside from the subject case.

25. A videctape rental and sales store is not an adult bookstore within the meaning of the Ordinance merely because it has a separate back room offering X rated videos and adult magazines to the public.

26. Sergeant Ferguson and Officer Major would each testify that as of the time Entertainment Resources' establishment was being cited on a daily basis, neither one of them had ever inspected another video store in the City of Knoxville in order to determine whether it complied with the Ordinance.

27. Entertainment Resources, LLC, owns and operates a number of videotape movie rental stores in Nashville, Tennessee. Its managing member, Vince Bohannon, has been in the video rental and sales business since 1981. He has owned and operated a number of different video rental stores, with a variety of different mixes of movie offerings, some with separate areas devoted to sexually explicit offerings and some without.

28. In 1998 Entertainment Resources formulated a business plan to open three stores in Knoxville, Tennessee, to rent movies on videotape. The plan was to open the first store and follow up with a second and a third location at approximately three-month intervals. The plan was that all three stores would have a separate back room.

29. The managing member, Vince Bohannon, personally conducted a search for available locations. He retained the services of a commercial real estate firm to assist in the effort.

30. The company first leased space on Bruhin Road in Knoxville and a manager, Mr. Lee Howard, moved to Knoxville and supervised the build out and opening of a video rental store there. Mr. Howard, who had previously served as a manager of Entertainment Resources' Nashville locations, relocated to Knoxville in order to serve as area manager for the Knoxville stores. However, the store was served notice by Sergeant Ferguson that the Knoxville zoning ordinance prohibited them from operating at that location. Following receipt of this notice, Mr. Bohannon closed the Bruhin Road locations and searched for a new location.

31. Based upon his reading of the Ordinance at issue, Mr. Bohannon believed the term "alcoholic beverage" included

beer as well as liquor. Mr, Bohannon was not able to find a location where he could relocate the Bruhin Road store that did not appear to him to be within 1000 feet of an establishment that sold beer or liquor or within 1000 feet of one of the other conflicting uses listed in the ordinance. When Mr. Bohannon leased the Papermill Road location he was aware that it was within 1000 feet of the Mexicali Rose Restaurant, an establishment that sold beer and liquor. He was not aware that the City would consider it to be within 1000 feet of a residentially zoned district which was on the other side of Interstate 40 or that the City would consider the Boy Scout administrative offices a place devoted in part or exclusively to recreational use.

32. Mr. Bohannon was advised by counsel that the Ordinance was unconstitutional. After opening the store at Papermill Road, Entertainment Resources sought declaratory and injunctive relief in federal court, seeking a judicial determination that the Ordinance was unconstitutional and an injunction against its enforcement. After the above styled case was initiated by the City of Knoxville, Entertainment Resources filed a counterclaim seeking injunctive relief, damages and a declaratory judgment finding the Ordinance unconstitutional or construing the definition of "adult bookstore" and the meaning of the various conflicting uses listed so that the Company could know what it needed to do to operate lawfully at Papermill Road or where it could relocate. Unable to consolidate all issues for trial in federal court, Entertainment Resources was allowed to dismiss the federal lawsuit without prejudice so that all issues could be determined in one action in this Court.

33. Following the opening of the Papermill Road location on August 3, 1998, while continuing to dispute the constitutionality of the Ordinance, Entertainment Resources

on several occasions reduced the portion of its stock of videotapes that had sexually explicit content in comparison to its total stock of videotapes and moved a wall to reduce the portion of square footage of store space in the "back room" and increase the proportion of the store devoted to the "front room." Those changes were made in an attempt to avoid continued classification as an "adult bookstore" under the Ordinance. Approximately $15,000.00 was spent to purchase additional bulk library stock of general release videotapes from other video stores. $3,000 was spent for additional front room movie display shelving units, and $1,500 was spent to move the dividing wall separating the two sections of the store. The stock of the back room was reduced by taking product off the shelves.

34. Entertainment Resources asked the police who conducted inspections and issued citations what portion of its stock was permitted to be sexually explicit material without making the business an adult bookstore under the Ordinance, but was unable to obtain any guidance. Previous counsel for Entertainment Resources sought such guidance from the City Law Department, but received no such guidance. The City Court judge assigned to hear the citations issued to Entertainment Resources advised that he did not know what percentage of stock of adult videotapes would be allowed under the Ordinance.

35. Following issuance of the temporary injunction in this case Entertainment Resources was not cited for a violation of the Ordinance after the back room was closed. However, Entertainment Resources was very concerned about the possibility of further citations based on its videos that were R rated, unrated or for mature audiences that were in the front room. Entertainment Resources sought advice of counsel regarding how it could continue to operate its business

without violating the injunction. Mr. Bohannon was advised by the attorney he consulted, Robert Crossley, that he could not continue to operate any back room or rent any front room videotapes with adult content without risking being found to have violated the temporary injunction. The substance of Mr. Crossley's advice is set forth in Mr. Crossley's affidavit. The store could not operate profitably without offering a selection of product that included some reasonable proportion of material for mature audiences, including R rated and unrated movies, along with material suitable for all age viewing. Therefore, store hours were reduced to a couple hours a week as necessary to comply with requirements to keep the lease. Only videotapes suitable for all age viewing were offered. The telephone, computer and other overhead was cut off. If no videotape was rented while the store was open, the employee in charge would personally buy one or two tapes and be reimbursed for the expense.

36. The store lost its lease at Papermill Road and possession was transferred to the landlord on February 28, 2001. If the store had been operating when the lease at Papermill Road expired, assuming there were suitable alternative locations where it could lawfully operate, it would have relocated as a going concern.

37. Entertainment Resources continues to operate video rental stores in Nashville and it remains the intention and plan of the company to open up and operate more than one location in Knoxville if and when a judicial determination is obtained regarding the constitutionality of the Ordinance, the meaning and application of the conflicting uses specified in the Ordinance and of the other terms of the Ordinance, including the term "significant or substantial portion of stock and trade."

38. Entertainment Resources has the financial means, intentions and capability to open a video store in Knoxville and to continue to pursue its original plan to ultimately open three locations, Entertainment Resources has a qualified manager already employed by the company who is ready, willing and able to relocate to Knoxville immediately and become area manager when the second and later third stores are opened.

39. Lee Howard began working for Entertainment Resources in the spring of 1996, and later became a manager for one of Entertainment Resources' Nashville locations.

40. In 1998, Mr. Howard moved to Knoxville to open Entertainment Resources' first Knoxville location. Mr. Howard was involved in performing the build out of the Papermill Road location and' after the store opened, he managed the Papermill Road location. It was expected that Mr. Howard would ultimately manage three locations in Knoxville.

41. During the entire time that he managed the Papermill Road store, Mr. Howard would testify that he did not observe nor was he ever informed by his employees about an unruly customer, nor did he observe any customer otherwise causing a disturbance.

42. Mr. Howard's duties included monitoring the parking lot and areas around the building. As a general rule, Mr. Howard would testify that the parking lot and surrounding area were clean. While he did occasionally find some litter left behind by someone, he found significantly less litter during the time that the store was opened than he had found when he patrolled the parking lot during the time that the store was being built out.

43. Entertainment Resources took a series of steps to change the mix of Entertainment Resources' stock in an effort to try to avoid classification as an "adult bookstore" under the Ordinance. On several occasions, Entertainment Resources reduced the proportion of sexually explicit stock located in the "back room" by reducing the number of videos in the "back room" and dramatically increasing the number of videos in the front room. In conjunction with that, Entertainment Resources moved an interior wall in order to increase the size of the front zoom and to decrease the size of the back room. Videotapes were purchased in bulk from other stores to build a base inventory or library. The company had begun the process of cataloging and setting up merchandising displays of this stock.

44. The computer cataloging of videos in the front room was completed in January 1999. Although there was not a complete catalogue of the front room videos at the time the temporary injunction was entered, that was because Entertainment Resources had not had sufficient time to catalog the influx of thousands of new movies that were added to the front room. In addition, there was not sufficient time to categorize those movies, although Mr. Howard continued to work toward doing so. The sexually explicit videos in the back room of Fantasy Video were categorized. The general interest front-room videos were not categorized.

45. Officers Ron Sexton and Teddy Green, both of whom are officers with the Knox County Sheriffs Office, worked as security guards at Entertainment Resources from October 1998 until the temporary injunction was entered. They monitored the store, parking lot and surrounding area.

46. These officers were hired not because Entertainment Resources had experienced a problem with its customers, as

it had not, but rather to verify that the peace was maintained and so that the store would have witnesses to prevent others from claiming, as had happened, that its customers or operators caused problems for neighbors.

47. The officers never saw any customer of Entertainment Resources cause any problems while at the store or in the store parking lot. The customers were cordial and well-mannered. Most of the customers were well-dressed individuals who appeared to be middle or upper middle class. Approximately 40% of the customers were women. The customers came in the store, picked out the videos they wanted and then left. No loitering was observed.

48. As part of their duties, the off-duty deputies would walk around in front and in back of the building, and none of them ever saw anything unusual or problematic in the parking lot. The officers never observed any beer bottles or other litter in the parking lot left behind by patrons of Fantasy Video.

49. Robert Kurth has previously testified to an increase in loiterers around Mexicali Rose, who were not customers of Mexicali Rose after Fantasy Video opened, but did not know personally whether or not they were customers of Fantasy Video.

50. The Knoxville police had received reports of vandalism break-ins from the previous tenant at the video store location who was a swimming pool contractor. While the video store was open, the police received a call from the restaurant next door reporting a disturbance inside the restaurant. The owner of the restaurant would testify that he was concerned about what customers of Entertainment

Resources might do. On one occasion, he found a condom in the back parking lot. He does not know who left it there.

51. John Edwards, Systems Administrator for the Knoxville/Knox County/Knox County Utilities Board Geographic Information System ("KGIS"), and Lieutenant Robert Hubbs of the Knoxville Police Department, performed an analysis of the City of Knoxville in an attempt to identify those areas that did not fall within the 1,000 foot buffer required by the Ordinance with reference to the six spacing parameters set forth in the Ordinance. Their analysis utilized the following assumptions about the following parameters.

a. "Residentially zoned district." Mr. Edwards utilized this parameter only with reference to areas within the City of Knoxville that were zoned "residential" by the City. The City did not consider other zoning districts within the City of Knoxville which permit residential uses, nor did the City consider areas zoned residential by Knox County that were outside the City of Knoxville, but contiguous to the City.

b. "Any area of amusement which caters, to family entertainment." Lieutenant Hubbs testified that it was "somewhat subjective" and that one had to make a subjective opinion about whether an area was one that catered to family Entertainment. Hubbs further testified that to him this spacing parameter meant a bowling alley, an arcade, or something clearly defined to attract and lure kids or families to come in there and use the business.

c. "Any area which is devoted in part or exclusively to recreational activity." Lieutenant Hubbs testified that "it depends on which side of the line you want to fall

on. It is all interpretations, and it is all mainly, the way I see it, to be decided at a Court probably at some point" when asked to define what this parameter meant. Lieutenant Hubbs further testified that in applying this parameter "we looked at it from the – I think what we were looking for was a primary source of income, the primary business, was that they were there to do." Lieutenant Hubbs further testified that he would not consider a playground at McDonald's to meet this parameter because "they were there to sell hamburgers."

d. "Any school, park, church, mortuary or hospital." Mr. Edwards did not consider medical office buildings and other similar buildings located on hospital campus to be part of a hospital. In generating the 1000 foot buffers from hospitals, the City generated the buffers from the footprint of the hospital building. In generating the 1000 foot buffer from parks, churches and schools, the City used the property line of the parcel at issue. The City does not know whether the 1000 foot buffers around mortuaries were measured from the footprint of the building or from the property line.

e. "Any adult business as defined by this section." Mr. Edwards did not consider adult businesses that were located outside the Knoxville city limits, but that were contiguous to the City of Knoxville. The City did not consider video stores such as Blockbuster Video and Gemstone Video to be adult businesses. Lieutenant Hubbs offered the following testimony regarding his understanding of the terms "substantial" and "significant":

i. The term "substantial" means greater than 50% while the term "significant" means something that you would notice.

ii. Although one would have to make a determination in each case, in each case you would want to determine about what percentage constituted a substantial portion.

iii. One would have to go in and look at a business and determine what is the business's overall mission as far as trying to attract a customer base and look at what they are doing, and make an assessment of the business.

iv. In enforcing the ordinance, one has to go in and look and see what is substantial, what is significant, what is part of the business's overall mission as far as trying to attract a customer base and look at what they are doing.

f. "Any other regulated use, including but not limited to establishments authorized to sell any alcoholic beverages for on- or off-premises consumption." The City did not consider beer to be an alcoholic beverage. At the last hearing in Knoxville Municipal Court with regard to the citations that were issued to the Fantasy Video store and, at the time it filed its complaint in this cause and at the preliminary injunction hearing, the City took the position that beer was an alcoholic beverage within the meaning of the Ordinance. The City gave no effect to the phrase "any other regulated use" in conducting its analysis.

g. The City did not consider other zoning or other regulatory restrictions, state or federal laws or ordinances that would prohibit operation of a video store. The City also did not exclude property owned by governmental bodies.

52. Using the criteria stated as applicable by the City, John Edwards and Lt. Robert Hubbs identified 304 sites within the city limits that they believed would be available under these criteria for an adult entertainment business. 33.4% of those sites were zoned for commercial use. Most of the remainder were zoned for industrial use. Some of those locations had signs indicating that they were available for occupation or development for commercial purposes. John Edwards identified 62,664.35 acres as the size of the City of Knoxville as of March 30, 2000. The land deducted for rivers or lakes and public rights-of way comprised 14,046.72 acres leaving 48,617.63 as the total Knoxville available parcel land. The sites identified using the criteria they were asked to apply, as described above, consisted of 2,653.36 acres or 5.5% of the City's available parcel land. The commercially-zoned acreage of the City of Knoxville is 7624.2 acres. Of the City's identified sites, 905.36 acres were commercially zoned, making approximately 11.9% of the City's commercially zoned real estate available under these criteria. Commercial zoning comprised 12.17% of the City's available parcel land, and available commercially-zoned sites under the City's criteria are 1.9% of the total available parcel land of the City.

53. Of the sites identified by John Edwards and Lt. Robert Hubbs, using the City's criteria, 35.7% of the identified parcels were industrially zoned. Of the City's 6081.7 acres of industrially-zoned property, 968.9 acres, or 15.9%, were

deemed eligible under the City's criteria. This industrial acreage is 2% of the City's total parcel land.

54. In combination, 69% of the 304 sites identified under the City's criteria are zoned either commercial or industrial. This comprises 1874.25 acres, or 13.7% of the total commercial and industrial zoning. This total commercial and industrial acreage is 3.9% of the total parcel land within the city limits.

55. KGIS produced a series of maps that Edwards and Hubbs used in their analysis. Four of those maps have been made exhibits. The yellow areas of those maps represent areas within the City of Knoxville and the white areas of the maps represent areas within Knox County. The pink areas on the maps represent areas that Edwards identified as sites where an adult business could be operated. The following maps have been made exhibits in this case:

a. The map that has been made Exhibit 16-A depicts a portion of the Cement Plant Road area of the City of Knoxville and Knox County. The entire portion of the large pink area is zoned "I-4, Heavy Industrial." The pink area in the middle of the river is an island which is not accessible by automobile and is zoned "F-1, Floodway District." The four small pink areas in the lower part of the map are all within 1,000 feet of areas in Knox County (but outside the city limits but contiguous to the City of Knoxville) zoned "RB, General Residential Zone."

b. The map that has been made Exhibit 16-B depicts a portion of western Knoxville near the intersection of Kingston Pike and North Peters Road. The entire portion of the large pink area south of Kingston Pike

is zoned "A-I, General Agriculture District." All pink areas on this map are within 1,000 feet of areas in Knox County (but outside the city limits but contiguous to the City of Knoxville) zoned "RB, General Residential" and "RAE, single family exclusive residential zone."

c. The map that has been made Exhibit 16-C depicts a portion of southern Knoxville around Alcoa Highway. The narrow white parcel bounded by a red dashed line (labeled "3529") is the "Mouse's Ear South," an adult business in Knox County that was outside the city limits at the time but on a parcel that has since been annexed. A large portion of the pink area immediately to the west is within 1,000 feet of the Mouse's Bar South. All of the acreage in the largest pink area and in the second largest pink area are zoned "A- 1, General Agricultural Zone." The remaining smaller pink areas in the Northwest corner of the map lie within 1,000 feet of areas in Knox County (but outside the city limits but contiguous to the City of Knoxville) zoned "RA, Low Density Residential Zone."

d. The map that has been made Exhibit 16-D depicts a portion of the City of Knoxville around the Island Home Airport, a small airport in the City. The pink area north of the Tennessee River is zoned "I-4, Heavy Industrial." The area south of the Tennessee River is zoned "A-1, General Agricultural" and is the site of the Island Home Airport.

56. Burl Cloninger, a retired FBI Agent, and William Fontanez, the Director of the Geographic Services Laboratory in the University of Tennessee Department of Geography

performed an analysis of the sites identified by the City of Knoxville. Their analysis utilized the following assumptions:

a. The spacing parameter "a residentially zoned district" was interpreted to include area in the City of Knoxville and areas in Knox County contiguous to the City of Knoxville, and it was interpreted to mean a zoning district for which residential uses were permitted as a matter of right.

b. The word "hospital" was interpreted to mean medical office buildings located on a hospital campus and to include the entire parcel on which the hospital was located.

c. The phrase "Any adult business as defined by this section" was interpreted to include "adult businesses" that were located outside the city limits but were within 1,000 feet of parcels that the City had identified as being available.

d. The phrase "establishments authorized to sell any alcoholic beverages for on- or off-premises consumption" was interpreted to include establishments that had a permit to sell beer.

e. Areas whose current zoning did not permit the establishment of a video store, including areas zoned "industrial", areas zoned "open space" and areas zoned "flood way districts" were not considered to be available.

57. Based on the assumptions set forth above, Entertainment Resources' analysis reveals that there were at most 23.01 acres, representing .0345% of the 66,664.81

acres in the City of Knoxville as of the date of the analysis. This represents .0473% of the 48,617.63 acres of parcel land the City of Knoxville identified.

58. If the term "other related use" is interpreted to mean uses of property that are related by zoning or other state, federal or local law or regulating land use, there would be no place in the City where a business classified as an "adult bookstore" would be allowed. In Mr. Burl Cloninger's opinion, "any other regulated use" would apply to any use that is regulated or governed by something. The analysis Mr. Cloninger did for Entertainment Resources discussed above did not take into consideration the phrase "any other regulated use."

59. The excerpts from the Knoxville City Council's February 20, 1979 and March 6, 1979 meeting that have been made Exhibits 3 and 4, respectively, are accurate transcripts of the City Council's consideration of Ordinance No. O-42-79, and those transcripts comprise the entire known legislative history of Ordinance No. O-42-79.

60. The City has no evidence that the City Council received any information about "secondary effects" of adult businesses, engaged in any discussion about "secondary effects, "or gave any consideration to "secondary effects" prior to the enactment of Ordinance No. O-49-79.

61. The excerpts from the Knoxville City Council's November 18, 1997 and December 2, 1997 meetings that have been made Exhibits 5 and 6, respectively, are accurate transcripts of the City Council's consideration of Ordinance No. O-595-97, and those transcripts comprise the entire known legislative history of Ordinance No. O-595-97.

62. The City has no evidence that the City Council received any information about "secondary effects" of establishments that are solely in the business of renting videos for off-premises viewing, engaged in any discussion about "secondary effects" of such businesses, or gave any consideration to "secondary effects" of such establishments prior to the enactment of Ordinance No. O-595-97.

63. Prior to the enactment of Ordinance No. O-595-97, Knoxville Code § 16-468 ("the Ordinance") did not regulate establishments that were solely in the business of renting and selling videotapes.

64. Officer Rebecca Brack, the representative with the Knoxville Police Department who handles beer and liquor education issues, would testify that the Knoxville City Code provisions that govern the issuance of beer permits expressly define beer to include beverages that contain less than 5% alcohol by weight. Any business selling beverages that contain greater than 5% alcohol by weight must obtain a liquor license to operate lawfully.

65. Officer Brack would testify that while beer, "malt liquor" beverages, and other beverages containing greater than 5% alcohol by volume are commonly sold by establishments with beer permits and are labeled as containing more than 5% alcohol, the sale of these beverages by beer permit holders is lawful because they contain less than 5% alcohol by weight.

66. Entertainment Resources owns and operates several videotape rental and sales outlets in Nashville. It operated successfully at Papermill Road from August 3, 1998, until December 10, 1998.

67. Entertainment Resources had a two year initial lease term. The rent was $2500 per month. Average monthly utilities after entry of the injunction were $350. The initial lease term expired June 1, 2000. Possession was returned to the landlord on February 28, 2001.

68. Entertainment Resources was obligated to pay and paid expenses for rent and utilities for a total of $71,616.89 with respect to the Papermill Road location during the period from the date of entry of the preliminary injunction in this cause through February 28, 2001, the date of transfer of possession. Those expenses from the date of entry of the prehminary injunction in this case through May 31, 2000, the date the lease expired, was $49,180.42.

69. If the Papermill Road store had been operating actively when its lease expired and another site in the City was available, Entertainment Resources would have relocated the store as a going concern if it had not been able to remain at the Papermill Road location.

70. Entertainment Resources has lost profits because of the entry of the preliminary injunction in this cause. The Papermill Road store was immediately successful and its rate of growth in sales and rentals, revenues and profits during the period prior to the entry of the injunction exceeded the rate of start-up growth of the Nashville Entertainment Resources store locations during similar periods following their opening. Entertainment Resources does not segregate its one time start up costs from its recurring monthly operating expenses when preparing monthly profit and loss statements. Therefore, as reflected on the charts provided by the CPA for Entertainment Resources, no profit is shown until all one time start up expense, including the initial purchase of rental inventory product, have been recouped. This accounting practice results

in a projected loss of $6,290 for the partial first year of operation from August 3, 1998, through December 31, 1998. However, the Knoxville location had an operating profit (revenue less recurring monthly operating expense) in the first month of operation. The actual profit & loss statements for the first four months of operation at the Knoxville location are exhibits. Additionally, in September 1998, (the second month of operation), there was approximately $4,000 in residual start-up cost, which when omitted from that month's profit and loss statement would result in an operating profit of $3,700 for the month.

71. Some of the stores operated by Entertainment Resources in Nashville have been more profitable than others, some generating more than twice the sales of others. This is reflected in the charts provided by the CPA for Entertainment Resources. The stores in Nashville are different sizes. The Knoxville store was approximately 3000 square feet. The largest Nashville store is approximately 2000 square feet. (VI, 749-773).

The parties also stipulated to the admissibility of a number of exhibits that are denominated "November 2001" and numbered 1 through 22. Some of these exhibits consist of multiple parts, with each part designated separately, such as "exhibit 15-A."

APPENDIX F

IN THE CHANCERY COURT
FOR KNOX COUNTY, TENNESSEE

No. 140736-2

[Filed December21, 1998]

CITY OF KNOXVILLE,	)
Plaintiff,	)
	)
v.	)
	)
ENTERTAINMENT RESOURCES, LLC	)
D/b/a FANTASY VIDEOS,	)
Defendants.	)
	)

ORDER GRANTING TEMPORARY INJUNCTION

For the reasons stated in open Court on December 10, 1998, as reflected in the transcript attached hereto and incorporated herein by reference as Exhibit A to this Order, the Plaintiff City of Knoxville and the intervening Plaintiff, the New Mexicali Rose, Inc.'s request for a temporary injunction are well-taken and the request for a temporary injunction enjoining Defendant is hereby granted. Plaintiffs are to post bond with sufficient surety, in the amount of seventy-five thousand dollars."

/s/_____
DARYL R. FANSLER,
CHANCELLOR

APPROVED FOR ENTRY:

/s/_____
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Assistant City Attorney
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Knoxville, TN 37902

EXHIBIT A

IN THE CHANCERY COURT
FOR KNOX COUNTY, TENNESSEE

No. 140736-2

[December 10, 1998]

CITY OF KNOXVILLE,	)
Plaintiff,	)
	)
v.	)
	)
ENTERTAINMENT RESOURCES, LLC	)
D/b/a FANTASY VIDEOS,	)
Defendants.	)
	)

MEMORANDUM OPINION

[p.3]

(The above-styled cause came on to be heard on the 10th day of December, 1998, before the Honorable Daryl Fansler, Judge of said Court, when the following proceedings were had:)

THE COURT: I want to begin by thanking counsel for briefs and all the law that you have provided to the court. Of course, we are here on the City's and the intervening petitioner's motion for a temporary injunction pursuant to the alleged violation of Ordinance 16-468 of the City of Knoxville.

Entertainment Resources, LLC, doing business as Fantasy Video, the owners of Fantasy Video opened the store on Papermill Road at 6422 in August of 1998, apparently with full knowledge of the existence of Ordinance 16-468. Mr. Bohannon testified that at that time the inventory consisted of 80 percent, what he referred to as adult videos, and 20 percent general family videos. He further testified that at the time of the opening he was advised by counsel that the ordinance was unconstitutional. Shortly after the opening, the Knoxville City Police Department commenced citing this business, resulting in 53 convictions in the Knoxville Municipal Court, 18 of which are on appeal. Subsequently, the video store [p.4] again changed the, or started changing the composition of its stock. At first the composition was altered so that the inventory was comprised of 60 percent general family videos and 40 percent adult videos. Mr. Bohannon testified that the inventory is now 70 percent general family and 30 percent adult. It was conceded by the defendant that those videos which have been referred to as adult videos are, in fact, distinguished or characterized by their emphasis on matters depicting, describing or relating to specified sexual activities or specified anatomical areas as defined by the ordinance. The majority of the floor space at Fantasy Video is occupied by the adult section containing these adult videos. Over 75 percent of the store's revenue and at least 85 percent of its customers are attributable to those videotapes. Mr. Bohannon, nevertheless, testified that the changes in the store inventory were made to bring the store into compliance with the ordinance so that the store would not be considered an adult bookstore. He further testified that he believes his store is in compliance with the ordinance in that a substantial or significant portion of his stock is not made up of pornographic material, as it has been referred to throughout the hearing.

[p.5]

The evidence showed that the adult videos were prominently displayed in the back room section on racks so that customers could observe the face or the front of the video carton. Now, these cartons or covers, the face of them consisted of photographs of males and females in varying combinations performing various specified sexual activity and exposing every anatomical area defined in the ordinance.

The so-called front area, which is considerably smaller, contains the general family videos. These, with the exception of a very few, were displayed so that only the side or the spine of the cartons could be observed by the customer. Unlike the adult tapes, these were not displayed by category, but were all mixed together. Some were stored in cardboard boxes that were set about the floor space. All of these videos were purchased from used video brokers. One of the videos that was offered for rental by Fantasy Video was titled *Families First,* and it is the type of video that is provided free to the public by the Church of Latter Day Saints.

Counsel for defendant is correct that the ordinance does not address percentage of sales, content of non-adult tapes, percentage of floor [p.6] space, and so forth; however, the Court finds that all of this information and all of these factors are to be considered in determining whether there is a substantial or significant portion of the stock in trade comprised of these defined adult videos. It is incredible that the defendant would assert that there is not a significant and substantial portion of the stock made up of these types of videotapes. In fact, the Court finds that the general family inventory, despite its number, is, in fact, insignificant and insubstantial to this business's stock in trade. These videos, of which defendant does not even have an inventory, were

brought in, the Court finds, for the sole purpose to try and create, in essence, a sham that defendant had tried to pass off as other than a business whose primary purpose is adult entertainment, with its stock in trade made up principally of videotapes characterized by their emphasis on sexual activities and anatomical areas.

Our local government's interest in preserving the quality and character of neighborhoods and urban centers can if properly set forth support restrictions on adult entertainment. In setting forth this interest, a local government may place great weight upon the experiences of and studies conducted [p.7] by other local governments as well as opinions of courts from other jurisdictions. The City of Renton case recognizes that legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects. Further, the Sixth Circuit Court of Appeals in the Tripplett Grill case versus City of Akron suggests that there is no requirement of affirmative evidence of secondary effects motivation in enacting the legislation. Defendantarguesthat the plaintiff, particularly the plaintiff, City of Knoxville, must justify the ordinance by producing legislative studies or other evidence prior to the enactment of the ordinance. Defendant suggests that in the absence of evidence showing undesirable secondary effects associated with this type of business, then the ordinance must fail. The federal cases in this Court's opinion do not support that argument. At least one court in the federal system has indicated that such an insistence by the judiciary would be an unwarranted intrusion into the internal affairs of the legislative branch of government. The City has proffered to the Court a number of cases from other jurisdictions which report findings of various studies across the country that detail secondary effects associated with adult [p.8] entertainment businesses, including depreciation in real estate values, increased crime, deteriorating residential

neighborhoods and an attraction of undesirable quantity and quality of transients, to quote from one case. These federal cases include Young versus American Mini-Theaters, the City of Renton case, Mom and Pops, Incorporated versus City of Charlotte, ILQ versus City of Rochester and others. In particular, the American Mini-Theaters case, the statute appears to be, there to be identical to this ordinance, with the exception that this ordinance has included the videotapes in the definition of the adult bookstore.

In this case, it is true that plaintiffs have offered no expert testimony regarding secondary effects; however, they have put on actual proof of the type of secondary effects that have been reported through these studies and which have been reported in the federal cases cited. Mr. Kurth, the owner of the New Mexicali Rose, testified to loitering, to theft of personal property, to complaints from customers, to decrease in family business, to decrease in female patrons, to litter, even the reporting of finding condoms in the parking lot, and other problems that have developed in the [p.9] months since Fantasy Video opened in August, and which were not present during the previous 17 months his restaurant was open. It is true that there is an absence of proof that these incidents were directly related or that the individuals that they had noticed in and about the premises were customers or direct customers of Fantasy video; but as the cases point out, this is exactly the type of activity and the type of individual which comprises the secondary effects that they seek to avoid. The Court finds that Mr. Kurth is a very credible witness, he responded promptly and thoroughly to questions put to him, and whose testimony went basically unimpeached. Further, a female patron who had been a customer of Mexicali Rose for 20 years testified that she now felt uncomfortable going to the restaurant alone since the opening of the video store. She stated that on one occasion she had to get an escort to her car because of an

individual loitering about her car. She testified that she would no longer go to that restaurant unless accompanied by her husband. Mr. Kurth testified that his sales had been on the increase up until the video store opened, and that since that time he had experienced a monthly decline in sales, except for one month that involved a special [p.10] promotion.

The Court finds all this to be credible evidence of incidental adverse social effects that provide an important governmental interest justifying a reasonable, time, place and manner of restrictions on the dissemination of the adult videos distributed by Fantasy Video. Section 16-468 is a legitimate zoning ordinance that regulates the time, place and manner of dissemination of these adult videos in an effort to eliminate or avoid the secondary effects of such businesses. The ordinance serves a substantial governmental interest and allows for reasonable alternative avenues for communication. Sanctions provided by the ordinance have proved ineffective in carrying out its intended purposes; fines imposed by the City have had no affect on defendant's operation, despire Mr. Bohannon's statement, which the Court does not find the least credible, that he has attempted to come into compliance with the ordinance. The owners of New Mexicali Rose are suffering immediate and immeasurable damage to their business and are facing economic loss both in the loss of customers and the devaluation of their business should they attempt to sell it. If, as Mr. Bohannon would have the Court believe, the adult [p.11] videos in his store do not comprise a significant or substantial portion of his stock in trade, then injunctive relief would pose no harm to his business. Additionally, injunctive relief will protect the public interest the ordinance seeks to further. Therefore, the defendant, Entertainment Resources doing business as Fantasy Video will be temporarily enjoined during the pendency of this action from operating an adult bookstore at 6422 Papermill Road, Knoxville, Tennessee.

This holding is based on the fact that a substantial and significant portion of the store's stock in trade is comprised of videos which are characterized by their emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas as defined in the ordinance. The injunction is not based on the fact that the store has a segment or section devoted to the sale or display of such material.

Anything else, gentlemen?

MR. HARTSOE: No, Your Honor.

MR. ELDRIDGE: Your Honor, we would ask that an injunction bond be granted under Rule 6505 to cover the losses or costs or damages that may be incurred in the event that this is later determined to have been an unlawful injunction, Your Honor, as [p.12] required by the rule.

THE COURT: Well, in the absence of a statute to the contrary, it probably is appropriate under the rule that a bond be posted. Is there any objection to that from either of the plaintiffs in the case?

MR. HARTSOE: May we have a moment to confer, Your Honor?

THE COURT: Yes.

(A pause in the proceedings was had.)

MR. HARTSOE: Your Honor, if it please the Court, plaintiff, City of Knoxville, would like until 10:00 o'clock tomorrow morning to respond on the bond issue.

THE COURT: In the absence of some reason to the contrary, I think the rule makes it clear that bond will have to be posted. I will give you until 10:00 o'clock tomorrow to respond to that. Mr. Eldridge, do you have a proposed amount of bond?

MR. ELDRIDGE: Your Honor, the revenues of this store are approximately twenty-two to twenty-five thousand dollars a month, and so we would ask that a bond be sufficient to cover the loss of revenue from this date to the day of trial I guess in [p.13] this case. I do not know, obviously, when that date would be, but that is our request of the Court in terms of the amount of bond.

THE COURT: The Court would suggest a bond in the amount of $75,000.00.

MR. ELDRIDGE: Just so the parties know, I am going to be traveling on business tomorrow and not available at 10:00 o'clock, if there is a issue that comes up on that question, I simply -

THE COURT: Could we defer this until Monday, the response as to the amount of the bond? Put it this way, unless there is an argument against the bond, the Court would say that it is $75,000.00.

MR. HARTSOE: I think that is fine, Your Honor, $75,000.00 or an argument against the bond. There may be some exception that the City is entitled to that frankly we arejustnot aware of at this time.

THE COURT: Well, the Court certainly has a docket on Monday morning, but would be able to try to take this up if we need to.

MR. ELDRIDGE: If we did it I guess early in the morning, Your Honor, I could be available at that time, or later in the afternoon.

[p.14]

THE COURT: Yeah, 8:30, you know that we are here and doing business at 8:30 every morning. Why don't we do that, if there is a problem with it, take it up in chambers Monday morning?

MR. KELLEY: One matter for clarification, Your Honor. Counsel has represented that the income is twenty-two to twenty-five thousand dollars a month. That leads me to believe that he is suggesting that during the pendency until a final hearing on the merits is held that the business will not sell adult videos.

MR. ELDRIDGE: Well, Your Honor, there is an order down at this point –

MR. KELLEY: That is how I would understand the Court's ruling.

MR. ELDRIDGE: We obviously are going to attempt to comply with the Court's order, and we would want to make sure that we know, I am assuming that from the fact that the Court has just announced the order, the order is effective as of right now?

THE COURT: It is effective as of right now.

MR. ELDRIDGE: Okay. I mean, we need to get enough time so that we can communicate to the employees of the

store and we don't find ourselves [p.15] in contempt in the next --

THE COURT: Well, let's make it effective at 3:00 o'clock this afternoon–

MR. KELLEY: Okay. Fine, Your Honor. Can we have, if we find authority that suggests a municipality is not required to post a bond in these circumstances, we will provide it to the Court and plan to argue Monday morning.

THE COURT: Try to provide it to Mr. Eldridge beforehand, as well.

MR. KELLY: Certainly.

THE COURT: I would also point out that there are two plaintiffs in this case.

The injunction flows against the defendant in favor of both plaintiffs.

MR. ELDRIDGE: Very well.

MR. HARTSOE: Thank you, Your Honor.

(Court was adjourned.)

APPENDIX G

KNOXVILLE CODE

ARTICLE XII. SEXUALLY ORIENTED BUSINESSES AND COMMERCIAL ACTIVITY

DIVISION I. GENERALLY

Sec. 16-468. Location of adult businesses.

(a) For the purpose of this section, the following words and phrases shall have the meanings ascribed to them in this subsection:

Adult bookstore means an establishment having as a substantial or significant portion of its stock and trade books, magazines and other periodicals, videotapes or other electronic media which are distinguished or characterized by their emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas, or an establishment with a segment or a section devoted to the sale or display of such material.

Adult business means any of the following businesses: adult bookstore, adult motion picture theatre, adult mini motion picture theatre, and adult cabaret.

Adult cabaret means a cabaret which features topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators or similar entertainers.

Adult mini motion picture theatre means an enclosed building with a capacity for less than fifty (50) persons, used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas, for observation by patrons therein.

Adult motion picture theatre means an enclosed building with a capacity of fifty (50) or more persons used for presenting material having as a dominant theme or presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas, for observation by patrons therein.

Specified anatomical areas means:

(1) Less than completely and opaquely covered:

a. Human genitals, pubic region;
b. Buttocks; or
c. Female breasts below a point immediately above the top of the areola; and

(2) Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

Specified sexual activities means:

(1) Human genitals in a state of sexual stimulation or arousal.

(2) Acts of human masturbation, sexual intercourse or sodomy.

(3) Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

(b) It shall be unlawful to establish, operate or maintain any adult business, that is, adult bookstore, adult motion picture theatre, adult mini motion picture theatre or adult cabaret, within the city, if the proposed location is within one thousand (1,000) feet of:

(1) A residentially zoned district;
(2) Any area of amusement which caters to family entertainment;
(3) Any area which is devoted in part or exclusively to recreational activity;
(4) Any school, park, church, mortuary or hospital;
(5) Any adult business as defined by this section; or
(6) Any other regulated use, including but not limited to establishments authorized to sell any alcoholic beverages for on- or off-premises consumption. Any location selling beverages that contain less than five (5) percent alcohol are not to be considered with regard to the required spacing.

Nothing contained in this section shall be construed to authorize the establishment or operation of any adult business which is otherwise prohibited or made unlawful by any other law or ordinance.

(c) Each violation of this section shall be considered a separate offense, and any violation continuing more than one-half (1/2) hour or reoccurring within one-half (1/2) hour shall be considered a separate offense for each half-hour (1/2) of violation.

(Code 1962, § 28-704; Oral. No. O-595-97, § 1, 12-2-97; Ord. No. O-261-01, § 1, 7-24-01; Ord. No. 0-72-02, § 1, 3-5-02)

2

No. 05-410

SUPREME COURT, U.S.
FILED
OCT 3 1 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CITY OF KNOXVILLE,

Petitioner,

v.

ENTERTAINMENT RESOURCES, LLC,
d/b/a FANTASY VIDEO,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Tennessee

BRIEF IN OPPOSITION

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CONSTITUTIONAL PROVISION

Tennessee Constitution, Article I, Section 8 2

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Entertainment Resources, LLC ("Entertainment Resources") submits this brief in opposition to the City of Knoxville's ("the City") Petition for a Writ of Certiorari. For the reasons set forth below, Entertainment Resources believes the Court should deny the City's Petition.

Although the City's Petition contains only a selective recitation of the facts, the entire factual record in the case is set forth in detailed factual stipulations into which the parties entered. Those stipulations are set forth in their entirety in Appendix E to the City's Petition. The facts that bear most directly on the issues raised by the Petition are incorporated into this brief.

REASONS FOR DENYING THE PETITION

I. The Court Lacks Jurisdiction to Review the Tennessee Supreme Court's Decision.

Respondent recognizes that when the adequacy and independence of a state law ground for a lower court's decision is not clear from the face of the opinion, the Court may accept "as the most reasonable explanation" that "the state court decided the case the way it did because it believed that federal law required it to do so." *Michigan v. Long*, 463 U.S. 1032, 1040-1041 (1983). However, in *Michigan*, the Court explained that it would not review such decisions if "the state court decision indicates clearly and expressly that it is alternatively based on bona fide, separate, adequate, and independent grounds." *Id.* at 1041. The Tennessee Supreme Court's decision in this case

does not adopt verbatim the language suggested in *Michigan v. Long* to signal its reliance on independent alternative state grounds for its decision. The Tennessee Supreme Court's decision nevertheless makes it clear that they are of the opinion, independently of any analysis of federal law, that Knoxville Code section 16-468 ("the Ordinance") cannot, in the context presented, be considered to meet the specificity requirements of Article I, section 8 of the Tennessee Constitution. Pet. App. 8a & 17a. The context, in this instance, is set forth in the stipulated facts peculiar to this case. Considering the opinion as a whole, it is apparent that the Tennessee Supreme Court's decision is grounded in the court's sensibilities regarding what Tennessee's highest judicial authority would expect a local municipal authority to provide in terms of interpretive guidance in connection with the administration of a statute regulating a local business. While this Court is the final arbiter of the application of those facts to the law with respect to Entertainment Resources' federal constitutional challenge, the Tennessee Supreme Court is the final arbiter of the application of those facts to the law with respect to Entertainment Resources' state constitutional challenge.[1]

---

[1] Even if the Court believes the Tennessee Supreme Court's opinion fails to rebut the presumption this Court adopted in *Michigan v. Long*, it seems likely that a reversal and remand by this Court would simply result in the Tennessee Supreme Court affirming its earlier decision in reliance on its authority as the final arbiter of the Tennessee Constitution. Respondent believes that is likely because the Tennessee Supreme Court has made clear that it retains that authority. *See Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 525 (Tenn. 1992) (explaining that "We reserve our authority as the 'court of last resort' in interpreting the Constitution of Tennessee," *quoting State v. Marshall*, 859 S.W.2d 289, 294-95 (Tenn. 1993)).

II. The Tennessee Supreme Court Correctly Determined that the Ordinance is Unconstitutionally Vague.

As the Question Presented in the Petition states, the issue before the Tennessee Supreme Court was whether the phrase "substantial or significant portion of its stock and trade," which appears in the Ordinance's definition of "adult bookstore," is unconstitutionally vague. Pet. i. In this Court, the City challenges the Tennessee Supreme Court's conclusion that the Ordinance fails to provide any guidance about what constitutes a "substantial or significant portion" of one's "stock and trade." The City posits that the Tennessee Supreme Court erred because it failed to consider the trial court's construction of the offending terms. Citing to the trial court's order granting the City a temporary injunction weeks after the City commenced the case in the Knox County Chancery Court,[2] the City redefines "substantial or significant" to mean "an important or non-trivial portion of the business's stock and trade."[3] Pet. 14. Having offered that definition, the City recites a partial list of factors ("percentage of sales, content of non-adult tapes, percentage of floor space, etc.") that, in the City's view, provide ample guidance for those seeking to determine what constitutes an "important or non-trivial portion" of a business's stock and trade. Pet. 14.

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[2] The Chancery Court enjoined Entertainment Resources from "operating an adult bookstore at 6422 Papermill Road" during the pendency of the litigation. Pet. App. 103a. In doing so, the Chancery Court provided no guidance on how Entertainment Resources could know whether or not any re-configuration of its establishment would take it out from under the Ordinance's purview.

[3] It is unclear whether the City believes that "important" and "non-trivial" are synonymous, because the two terms do not appear to be synonymous.

Far from curing the vagueness problem that afflicts the "substantial or significant" phrase, the City's "important or non-trivial" definition would serve only to exacerbate the Ordinance's infirmities, proposing to place solely in the hands of City officials the determination about whether an establishment is subject to regulation.[4] Before the City commenced this litigation, officers with the Knoxville Police Department cited Entertainment Resources for violation of the Ordinance on a daily basis. Pet. App. 70a, at ¶ 2. The officers who issued those daily citations testified at hearings on some of those citations that they had received no training or guidance regarding the meaning of the terms of the Ordinance; the parties stipulated that the City never promulgated any standards or guidelines for such officers or others involved in enforcement decisions; and at the hearings on the citations those officers were unable to articulate the meanings of the terms "substantial" and "significant." Pet. App. 71a & 73a, at ¶¶ 5, 6, 12 & 13. The City responded to those problems by advancing a position consistent with the "curative" definition the City now advances in this Court. In particular, the City stipulated that had those officers been called to testify at a hearing on the merits in this case, they would have testified that in making the evaluation of whether an establishment's stock and trade was "substantial or significant," they would "look to what

[4] The more fundamental problem with the City's proposed fix is that it is neither grounded in, nor guided by, any legislative purpose for the Ordinance. Instead, the City's efforts to justify the Ordinance, including its efforts to defend the vagueness challenge, are, quite simply, arbitrary. Unable to explain how its proposed definition, or any other proposed definition, is informed by a legislative statement of purpose, the City simply seeks to maximize the Ordinance's reach.

appeared to them to be the 'important part of the business.'"[5] Pet. App. 74a, at ¶ 14 (emphasis supplied). As the Tennessee Supreme Court remarked, "I know it when I see it" does not provide the objective guidance the United States and Tennessee Constitutions demand. Pet. App. 11a. Indeed, just as the Tennessee Supreme Court concluded, it amounts to no guidance at all.

Moreover, the City's curative definition of "substantial or significant" conflicts with its own understandings of the Ordinance's reach. The City stipulated that there are a number of "Gemstone Video" stores located in Knoxville and that it is the City's position that those Gemstone Video stores are not "adult bookstores" within the meaning of the Ordinance. Pet. App. 75a & 76a, at ¶¶ 20 & 23. The City takes that position despite the fact that: (1) each of those Gemstone stores has "separate back rooms in which 'X-rated' sexually explicit videos are displayed and offered for rent or sale;" (2) the backroom of at least one of those Gemstone stores contains at least 1,000 such videos with sexually graphic box cover displays and a display rack containing Playboy, Penthouse and similar magazines; (3) the front room of that Gemstone store has a "Mature" section that consists of videos "distinguished or characterized by their emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas;" and (4) several other sections of the front room of that Gemstone store contained numerous films "distinguished or characterized by their emphasis on matter depicting, describing or relating to specified sexual activities

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[5] "Use your unguided discretion" appears to be the guidance the City provided its officers in response to the City's recognition that they had to provide some guidance.

or specified anatomical areas." Pet. App. at 75a-76a, at ¶ 20. Under any reasonable (or indeed, any) understanding of the phrase "an important or non-trivial portion of the business's stock and trade," those materials constitute an "important or non-trivial" portion of Gemstone's stock and trade. The City's application of its new definition demonstrates that definition cannot cure the Ordinance's vagueness ills.

The City also criticizes the Tennessee Supreme Court for holding that the only constitutionally sufficient guidance is a "percentage standard." That criticism is not fair, for the Tennessee Supreme Court did not find fault with the City for its failure to offer such a quantitative standard. Rather, it expressed exasperation at the City's repeated and willful refusal to provide *any* guidance, even in the face of multiple requests for such guidance from both Entertainment Resources and the Court. Pet. App. 14a-15a.[6] In its opinion, the Tennessee Supreme Court recounted the game of cat and mouse the City played on the issue, refusing to provide Entertainment Resources with any guidance as it first sought such guidance from the City and then repeatedly altered its stock in an effort to come into compliance. Pet. App. 14a-15a. The Tennessee Supreme Court also found it difficult to understand the City's reluctance to provide any guidance, since the City "must have had some idea of what amount of sexually-explicit material was tolerable under the Ordinance," as evidenced by the City's position on the Gemstone Video stores. Pet. App. 15a.

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[6] After recounting the City's recalcitrance, the Court remarked, quite correctly, that "In our view, requiring a party to engage in this sort of guessing game is a clear violation of due process." Pet. App. 14a.

While the City misconstrues the Tennessee Supreme Court's holding, this case seems to demonstrate that there is no way to offer constitutionally sufficient guidance in this case without resorting to quantitative factors. The City has had nearly seven years since it commenced this litigation to determine what the phrase "substantial or significant" means. Seven years into the litigation, the factors that the City looks to for constitutionally sufficient guidance are themselves quantitative. Pet. 14. Specifically, the City argues that the Ordinance provides sufficient guidance because one can look at such factors as "percentage of sales, content of non-adult tapes, percentage of floor space" to determine whether "sexually explicit material" constitutes a substantial or significant portion of one's stock and trade. Pet. 14. Those are percentage requirements, which the City contends can "provide guidance to those . . . who are seeking to conform their conduct to the Ordinance." Pet. 14. Entertainment Resources agrees that quantitative factors, such as percentage of floor space, can provide adequate guidance. But they can do so only if the regulators and the regulated both understand the formula into which those quantitative measures are plugged to determine whether a business is subject to regulation. Therefore, it appears the only way to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly," *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), is to establish a percentage standard.

The City's more sustained attack on a percentage standard is grounded in purported public policy concerns. The City argues that imposing a quantitative standard will facilitate what it terms "sham compliance" – establishments will alter the product mix in their inventory or

alter the percentage of floor space devoted to regulated material in order to come into technical compliance with a regulation, but those establishments will retain their "essential nature" as a purveyor of sexually explicit material. Pet. 15-16. The City's concern is that permitting such "sham compliance" serves to frustrate the Ordinance's purpose. Pet. 16. Although the City does not specifically articulate the Ordinance's purpose, the only constitutionally-permissible purpose of such a content-based ordinance is combating the so-called "secondary effects" of regulated establishments. The City ventures onto thin ice in making that argument in the context of this case, because it is clear that the Ordinance does not meet the requirements of the "secondary effects" doctrine, so the Ordinance serves no constitutionally permissible purpose.[7]

As the City is aware, zoning regulations such as the Ordinance pass constitutional muster under the First Amendment to the United States Constitution only if the municipality can demonstrate that the regulation is not aimed directly at the content of the regulated expression, but rather is aimed at the so-called "secondary effects" of the dissemination of that expression into the marketplace. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41

[7] Entertainment Resources challenged the ordinance on the ground that the City could not meet its burden of proving that the Ordinance was aimed at combating so-called "secondary effects," meaning that the Ordinance could not be treated as a time, place and manner regulation. Both the Tennessee Court of Appeals and the Tennessee Supreme Court deemed it unnecessary to reach that issue, and the other issues Entertainment Resources raised, in light of those courts' conclusions that the Ordinance was unconstitutionally vague. Pet. App. 16a & 44a-45a. The City's Petition, however, illustrates that the vagueness issues raised by this case cannot be divorced from the secondary effects issues.

(1986). More recently, in *City of Los Angeles v. Alameda Books, Inc.*, the Court clarified that courts analyzing whether a zoning regulation fits within the secondary effects exception must undertake a two-step inquiry, explaining that "in *Renton*, the Court distinguished the inquiry into whether a municipal ordinance is content neutral from the inquiry into whether it is 'designed to serve a substantial government interest and does not unreasonably limit alternative avenues of communication.'" 535 U.S. 425, 440 (2002), *quoting City of Renton*, 475 U.S. at 47-48. In *City of Los Angeles*, the Court went on to explain that the inquiry into whether an ordinance is content neutral "requires courts to verify that the 'predominant concerns' motivating the ordinance 'were with the secondary effects of adult [speech], and not with the content of adult [speech].'" *City of Los Angeles,* 535 U.S. at 440-441, *quoting City of Renton*, 475 U.S. at 47.

The Ordinance cannot meet that burden because the City stipulated that it has no evidence that secondary effects were the predominant concern motivating passage of the Ordinance. Indeed, the City stipulated that it has "no evidence" that the City Council received any information about, engaged in any discussion of, or *gave any consideration to* secondary effects prior to enactment of the Ordinance and the amendment to the Ordinance under which video stores became subject to the Ordinance. Pet. App. 92a & 93a, at ¶¶ 60, 62 & 63. Because the City has no evidence the Ordinance was motivated by concerns about secondary effects, it has no standing to argue that an establishment that altered its product mix to comply with a quantitative standard would nonetheless continue to generate negative secondary effects. The City's concerns about frustrating the Ordinance's purposes are, at least in

this case, simply a pretext for the City's desire to regulate unpopular speech, making this an inappropriate case to consider whether quantitative standards frustrate or actually further such regulations' purposes.[8]

More fundamentally, the stipulated fact that the City did not consider the issue of secondary effects in enacting the Ordinance explains why the City could not provide legitimate or consistent guidance regarding its proper interpretation or application. Given that the City failed to consider or articulate a constitutional purpose for the legislation, it is not surprising that the agencies charged to enforce it were unable to provide any form of guidance, formal or informal, regarding how it might be applied or interpreted in a way that is rationally related to a constitutional end. Even at this late date, the City's best attempt to articulate a meaning for the Ordinance consistent with its purpose devolves into argument about whether any more than a trivial amount of stock or trade of objectionable content may be tolerated.

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[8] Resolution of this issue should await a case in which there is some evidence regarding the impact of differing inventory mixes on secondary effects. That is because in setting a standard the City cannot arbitrarily adopt a standard. Instead, any standard must be linked to secondary effects in that it must be set no higher than the level the City reasonably believes necessary to ameliorate secondary effects. Therefore, consideration of whether a percentage standard frustrates or furthers efforts to ameliorate secondary effects cannot be considered in the absence of evidence on that point. In the absence of such evidence, the City's concerns about a percentage standard are hypothesized at best and disingenuous at worst.

III. The Tennessee Supreme Court's Decision Will Have Little Impact Outside of Knoxville, Tennessee.

The City argues that the Tennessee Supreme Court's opinion threatens the viability of more than 275 municipal ordinances that adopted the "substantial or significant" formulation after this Court rejected vagueness challenges to a Detroit ordinance that employed that very language. *See Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). While this Court rejected, on standing grounds, the vagueness issues raised in *Young*, those challenges were mounted by operators of two "adult motion picture theaters," so the "substantial or significant" language was not before the Court in *Young*. *Id.* at 55 & 58-61.

More importantly, the Tennessee Supreme Court's opinion in this case was grounded in, and will be limited by, the unique facts of the case. As the discussion above recounts, the Tennessee Supreme Court's decision was driven by the fact that the City of Knoxville repeatedly refused to provide any guidance on the contours of the Ordinance to Entertainment Resources, the Knoxville police officers who were charged with enforcing the Ordinance, or even to the court. Pet. App. 11a-15a. The Tennessee Supreme Court was particularly perplexed by the City's reluctance to provide any guidance, since the City's position on the Gemstone Video stores made clear the City had some idea of where the dividing line must lie (or perhaps simply had an idea about which businesses it wanted in the City and which businesses it did not). Pet. App. 15a.[9] Despite its holding that the Ordinance was

[9] Chief Justice Drowota, who concurred in the results because he determined that the Ordinance was vague as applied to Entertainment

(Continued on following page)

vague on its face, the majority opinion acknowledged the possibility that the Ordinance was subject to a narrowing construction that would save it. Pet. App. 14a. The majority opinion, however, stated that in the absence of "any hint from the City," it was "at a loss" as to how to impart meaning without rewriting the Ordinance. Pet. App. 14a. Under those unique circumstances, it had no choice but to strike down the Ordinance.

The Tennessee Supreme Court's frustrations (shared in both the majority and concurring opinions) with the City's failure to provide any guidance in the face of repeated requests provide a roadmap for municipalities seeking to avoid the same fate as the City of Knoxville. If municipalities insist on holding onto the "substantial or significant" language, they can avoid the City's problems by providing guidance on the meaning of those terms to (1) those charged with enforcing the regulation, (2) those potentially subject to regulation by it, and (3) courts called upon to adjudicate disputes arising under the regulation. For that reason, the Tennessee Supreme Court's opinion is unlikely to have the far-reaching impact the City predicts, so the opinion does not warrant review by this Court.

Resources, also took the City to task for failing to provide any such guidance. Pet. App. 18a-19a.

CONCLUSION

For the foregoing reasons, the City's Petition for a Writ of Certiorari should be denied.

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In the Supreme Court of the United States

City of Knoxville,

Petitioner,

v.

Entertainment Resources, LLC,
d/b/a Fantasy Video,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Tennessee

PETITIONER'S REPLY BRIEF

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ARGUMENT IN REPLY

Respondent's brief in opposition to the petition is tellingly silent on the most basic reason for granting certiorari in this case: a significant split of authority over a recurring question of constitutional law requiring this Court's resolution. This reason for granting the writ, addressed at pages 9-12 of the petition, with additional citations to conflicting appellate decision at pages 14-16 thereof, goes unanswered by respondent. Instead, the brief in opposition makes an irrelevant jurisdictional argument and then contends that the Tennessee Supreme Court was correct in striking the phrase "substantial or significant portion of its stock in trade" as unconstitutionally vague on its face. The problem, however, is that numerous courts have reached the opposite conclusion in this same context, warranting the Court's intervention to settle this question that affects hundreds of municipalities around the country.

I. Because Due Process Protections Under the United States and Tennessee Constitutions Are Identical, This Court Has Jurisdiction Under *Michigan v. Long*.

Respondent's argument that the Tennessee Supreme Court held the ordinance to be unconstitutional under the state, as well as the federal, constitution merely restates that which is obvious from the decision below. Pet. App. 17a. This observation, however, does not call into question the jurisdiction of this Court because the Tennessee Supreme Court made it clear that "Article I, section 8 of the Tennessee Constitution provides an identical protection" as that provided by the Due Process Clause of the Fourteenth Amendment. Pet. App. 8a. Moreover, the Tennessee Supreme Court's decision herein, as well as its earlier cases cited in that decision, rely extensively on federal law. Pet. App. 8a-9a

(citing this Court's vagueness standards from *Grayned v. City of Rockford*, 408 U.S. 104 (1972), *Kolender v. Lawson*, 461 U.S. 352 (1983), *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), and *Smith v. Goguen*, 415 U.S. 566 (1974)). Thus, there is no basis for concluding that the lower court decision rests on separate and independent state law grounds. Rather, the "the non-federal ground is so interwoven with the [federal ground]" that this Court's "jurisdiction is plain." *Michigan v. Long*, 463 U.S. 1032, 1039 (1983) (quoting *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164 (1917)).

II. Respondent Acknowledges that the Decision Below Requires Mathematical Precision in Contravention of Established Vagueness Doctrine.

Respondent's merits argument ignores the crux of the City's petition – the split of appellate authority on the question *sub judice* – and instead argues that this case is on the correct side of the split. But even this contention runs headlong into controlling precedent from this Court.

Respondent concludes that "it appears the only way to 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly,' *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), is to establish a percentage standard." Brf. in Opp. 7.[1] Respondent thus correctly observes that the Tennessee Supreme Court's decision requires what neither this Court's precedents nor the on-point appellate authorities require: the mathematical precision of a specific percentage.

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[1] Respondent's brief then undertakes a discussion of the secondary effects doctrine that is irrelevant to whether the ordinance is unconstitutionally vague – the only question presented for review.

To survive a vagueness challenge, enactments need not provide "meticulous specifics" or mathematical precision; they are permitted "flexibility and reasonable breadth." *Grayned*, 408 U.S. at 110; *see also, e.g., Z.J. Gifts D-2, L.L.C.* v. *City of Aurora*, 93 P.3d 633, 639 (Colo. Ct. App. 2004) ("Furthermore, courts have determined that the terms 'substantial' and 'significant' have recognized meanings in the English language, and their use in the definition of 'adult bookstore' does not render them vague merely because a percentage of business devoted to floor space, sales, or inventory is not specified'") (internal citations omitted). Celestial precision is not constitutionally required, and uncertainty at a statute's margins will not warrant facial invalidation if it is clear what the statute proscribes "in the vast majority of its intended applications." *Hill v. Colorado*, 530 U.S. 703, 705 (2000).

Here, the Tennessee Supreme Court held that the term "substantial or significant" is unconstitutionally vague on its face because it does not specify an exact percentage of inventory that will successfully circumvent the ordinance. Pet. App. 14a. That decision is plainly contrary to this Court's vagueness doctrine – which holds that mathematical precision is not required – and should be reversed.

III. The Tennessee Supreme Court Invalidated "Substantial or Significant Portion of Its Stock in Trade" as Unconstitutionally Vague On Its Face, and the Facts of This Case Do Not Limit the Impact of That Determination.

Respondent's concluding argument cannot be squared with the decision it seeks to insulate from review. Conceding that hundreds of cities nationwide employ the language at issue herein, respondent makes the unpersuasive claim that the

Tennessee Supreme Court's decision is "grounded in, and will be limited by, the unique facts of the case." Brf. in Opp. 11.

The problem with this argument, of course, is that the Tennessee Supreme Court invalidated the Knoxville ordinance *on its face*. Indeed, the majority refused to adopt the narrower concurrence of their Chief Justice, who found the ordinance to be unconstitutional only as applied to Entertainment Resources based on the facts particular to the Fantasy Video store. Pet. App. 18a. Thus, the majority opinion is in conflict with both state and federal appellate opinions – including one from the Circuit in which Tennessee sits – that have rejected facial challenges to the same language. *See, e.g., Z.J. Gifts D-2, supra*; *City of Chicago v. Scandia Books*, 102 Ill. App. 3d 292, 430 N.E.2d 14, 18, 58 Ill. Dec. 72 (Ill. Ct. App. 1981); *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413, 1419 (8th Cir. 1994); *511 Detroit Street, Inc. v. Kelley*, 807 F.2d 1293, 1296 (6th Cir. 1986).

Respondent simply ignores these conflicting authorities that demonstrate the need for this Court to resolve the question presented.

CONCLUSION

For the reasons stated herein and in the Petition for a Writ of Certiorari, the City respectfully requests that the Court grant the Petition.

November 4, 2005

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